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IN THE

Supreme Court of the United States

OCTOBER TERM 1981

THE PROCTER & GAMBLE MANUFACTURING COMPANY
PORT IVORY, NEW YORK, PLANT
KANSAS CITY, KANSAS, PLANT
DALLAS, TEXAS, PLANT
BALTIMORE, MARYLAND, PLANT
Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether an employer has a statutory obligation to create and grant leave from scheduled work for employees in one bargaining unit to negotiate contracts on behalf of other bargaining units at other locations represented by different Unions, where the Board and the lower court found that the employer's denials of Union leave requests for such purposes were lawful under the existing labor agreements?

2. Whether the Board has the authority to order an employer prospectively (a) to grant leave to employees in one bargaining unit to represent another Union's bargaining unit in negotiating the latter unit's agreement; (b) to negotiate on plant premises; (c) to pay local Union negotiators; and (d) to pay the full cost of negotiating facilities?

3. Whether an employer who has voluntarily bargained on plant premises and paid Union negotiators in past negotiations has a statutory obligation to continue such practices, despite having discontinued them by agreement or after bargaining to an impasse?

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v.

NATIONAL LABOR RELATIONS BOARD
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The Petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in this proceeding on September 4, 1981.

I.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Fourth Circuit is reported at 658 F.2d 968 (4th Cir. 1981), and appears in the Appendix hereto at pp. 1a-34a. The Decision and Order of the National Labor Relations Board is reported at

248 NLRB 953 (1980), and appears in the Appendix at pp. 35a-41a. The recommended Decision of the Administrative Law Judge in this case is reported at 248 NLRB at 955 (1979), and appears in the Appendix at pp. 42a-111a. The lower court's Order of January 8, 1982, denying Petitioner's Motion for Rehearing appears in the Appendix at p. 112a.

II.

JURISDICTION

The Judgment of the Court of Appeals for the Fourth Circuit was entered on September 4, 1981, with a 2-1 vote. A timely Petition for Rehearing and Suggestion for Rehearing *En Banc* was denied on January 8, 1982, again with a 2-1 vote. Petitioners' application for an extension of time within which to file our Petition for a Writ of Certiorari was granted by Chief Justice Warren E. Burger on April 1, 1982, extending our time to and including June 7, 1982 (see Appendix at p. 113a). The Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

III.

STATUTORY PROVISIONS INVOLVED

United States Code, Title 29:

> Section 158(a) It shall be an unfair labor practice for an employer —
>
> (1) interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 157 of this title;
>
> • • •
>
> (5) refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 159(a) of this title.
>
> Section 158(d) [in pertinent part] the purposes of this section, to bargain collectively is the performance

of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession.

Section 159(a) [in pertinent part] Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment or other conditions of employment.

IV.

STATEMENT OF THE CASE

This case involves an order by the National Labor Relations Board ("the Board"), enforced by a divided three-judge panel of the Court of Appeals, holding that an employer, who correctly interpreted its collective bargaining agreements by denying time off to employees to participate in negotiations for separate unions representing bargaining units other than their own, should nonetheless have created and granted "an alternative form of uncompensated leave" for its employees (A. 103a).

The case also involves the validity of an order that the Company *in futuro* create and grant leave to employees in one bargaining unit to negotiate on behalf of different unions representing different bargaining units; pay local union negotiators; bargain on plant premises; and grant plant access to non-plant personnel to participate in the bargaining for a separate

unit that does not represent them. Further, if bargaining is conducted off plant premises, the Company is ordered to pay the full cost of the bargaining facilities.

Parties to the Proceedings

The parties are four plants of The Procter & Gamble Manufacturing Company and four independent Unions representing the four separate bargaining units at these plants. These plants are located in Baltimore, Dallas, Kansas City, and Port Ivory, Staten Island, New York.

How the Cases Arose

These cases grew out of a series of separate contract negotiations between each of four plants of the Company and four respective independent Unions which represent the employees at each particular location in separate bargaining units. The negotiations took place between October 1976 and December 1977. Several months before negotiations began at the first plant (Port Ivory), the four Unions had declared their common intent to establish "a multi-plant unit or units". This goal of multi-plant bargaining is unlawful if attempted to be enforced unilaterally.[1] As was its right, the Company was opposed to multi-plant bargaining.

When employees from other plants who were officials in other Unions showed up at Port Ivory's first bargaining session, the Company was uncertain as to which unit they purported to represent and did not want inadvertently to be drawn into multi-plant bargaining. It, therefore, questioned them about their role. They stated that their role was to help Port Ivory's independent Union negotiate its own contract. As the Board found, the Company then readily agreed to negotiate, recognizing the right of the Port Ivory Union to select its own bargaining committee and, under the principle of *General Electric Co. v. NLRB*,[2] to include persons outside its unit on such committee. No objections to their presence were raised at

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[1] *Minnesota Mining and Manufacturing Co. v. NLRB*, 415 F.2d 174, 176-77 and n. 2 (8th Cir. 1969).

[2] 173 NLRB 253 (1968), *enf'd.* 412 F.2d 512 (2d Cir. 1969).

Port Ivory or at the other three plants when non-plant employees also attended their respective negotiations. The Administrative Law Judge ("ALJ"), the Board, and the lower court concluded that the Company never refused to meet and bargain with the Unions' own selected committees.

The Union Leave Issue

Port Ivory was the first plant where negotiations were conducted. As the negotiations began, Union officials in the three different Unions at the three other plants (where negotiations were *not* in progress) requested Union leave under their respective contractual Union business leave provisions to participate as members of the bargaining committee for the separate, independent Union at Port Ivory. When questioned by the management at the plants where they worked, these employees made it clear that they were not seeking to represent their *own* plant's bargaining unit. Rather, they stated that they intended to serve as Union negotiators for the Port Ivory bargaining unit. A similar process was repeated at the other three plants as negotiations began at each.

Management at each plant denied these Union leave requests because each plant's contract clearly provided Union leave only to pursue the business of the particular Union at that plant. The Board and the court below found that plant management was *correct* in denying the leave requested under each plant's Union business leave provision.[3] No request for any other type of leave of absence was ever made at any of the four plants. Therefore, the necessary effect of the holding here is to impose upon the Company a *statutory* obligation to grant leave to each plant's employees to bargain on behalf of *other* plant Unions and bargaining units.

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[3] Indeed, while the Board grudgingly admits that the Company correctly interpreted its contractual Union business leave provision, it approvingly cites the ALJ's finding that "the Company's application of that provision ... operated to unlawfully interfere with the unions' use of outsiders" (Bd. Brief to Fourth Circuit, pp. 36-37). Thus, the Board announces the new principle that an employer who lawfully insists upon enforcing the provisions of its collective bargaining agreement in the face of Union demands to ignore them, thereby establishes one of the essential elements of an unfair labor practice.

The Plant Access Issue

Each plant had a long-standing, non-discriminatory plant security rule which barred access to non-plant employees, including employees of other Procter & Gamble plants, except on limited guided tours. Thus, it was obvious that the bargaining which had previously taken place on plant premises would have to be held elsewhere in order to accommodate each Union's desire to have non-plant employees present. Otherwise, the plant access rule would have to be violated. Bargaining off plant premises in no way excluded non-plant employees from the negotiating process, but actually facilitated the Unions' objective. Despite this, the Board held that the Company must waive its plant rules in order to permit non-plant employees to bargain on plant premises.

Resolution of Pre-negotiation Issues

To resolve the pre-negotiating issues which first arose at Port Ivory, two meetings were held at the instance of the Company. As a result of these meetings, the ground rules for negotiating were agreed upon: bargaining would be off-premises; the cost of negotiating facilities would be split between management and the Union; and there would be no pay to local employee negotiators.[4] In the three remaining plants, the same issues of situs for bargaining and pay for negotiators were discussed and, after agreement or impasse, similar ground rules were followed.

* * *

The negotiations then proceeded plant by plant, and collective bargaining agreements were reached with the Unions' mixed negotiating teams at each location without strikes. Indeed, at three plants, agreement was reached prior to the expiration of the previous contracts.

The ALJ's Findings

The Unions filed charges, and the General Counsel issued five complaints which were consolidated for hearing before an

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[4] The Union at Port Ivory itself approvingly recited these ground rules at the first negotiating meeting on October 6, 1976 (see Court of Appeals Record, A. 239-40, 1149, 1179-80).

ALJ in Brooklyn, New York. The ALJ made specific rulings favorable to the Company on issues of fact and law that are clearly inconsistent with the ultimate decision of the ALJ, the Board, and the Court below. These findings are:

(1) There was *no* contractual obligation for the Company to grant the Union business leave requested (A. 97a, 103a).

(2) There was *no* statutory right for the Union to bargain on plant premises (A. 96a).

(3) There was *no* statutory obligation for the Company to pay Union negotiators (A. 96a).

(4) The Company at all times acknowledged the right of each Union to bring non-unit employees onto their bargaining team (A. 94a).

(5) The Company did *not* refuse to meet with each Union's mixed negotiating team (A. 97a, 103a).

(6) The Company did *not* refuse to bargain with these mixed committees (A. 103a).

(7) The Company did *not* negotiate in bad faith with no intention to reach agreement (A. 104a).

(8) The Company did *not* negotiate in bad faith concerning substantive issues (A. 48a, 104a).

(9) The Company did *not* commit an unfair labor practice by threatening to discipline employees who, after Union business leave was properly denied, still used it to participate in another unit's bargaining (A. 104a).

Nevertheless, the ALJ, in a Decision adopted by the Board and a majority of the three-judge panel, ruled that the Company violated Sections 8(a)(1), (3),[5] and (5) of the Act (A.

[5] For purposes of this Petition, the Company is not challenging the Section 8(a)(3) finding concerning vacation leave denial because of its insignificance. The Board admits that at least eight employees used vacation leave to participate in negotiations at other plants (A. 101a-102a). Only two employees made vacation requests which were denied, and one of those denials concerned a day when no bargaining took place. In short, even if the Unions' "right" to such leave existed, it has not been violated here.

99a, 103a). The ALJ's recommended Order provided that in future negotiations the Company must (1) create and grant "uncompensated leave and/or vacation time to its employees to ... attend and participate in contract negotiations as a representative of the Union which is the bargaining representative of the employees at another of the Respondent's plants ...."; (2) "make its plant premises available to any of the Union [sic] ... for the purpose of negotiating ... [even though] the Union involved in the negotiations has ... designated persons not employed in the bargaining unit to attend and participate in the negotiations ...."; and (3) pay "plant employees on the negotiating committee ... for ... time spent in negotiations ...." (A. 109a).

Inexplicably, the ALJ ordered the Company to meet and bargain with each Union's mixed bargaining committee, although he had specifically found that there was *no* such refusal. Thus, there is no predicate for such an Order. Nonetheless, the Board and court below adopted it.

The Board's Findings and Order

On appeal, the Board adopted the ALJ's Findings of Fact and his recommended Order with little comment. In addition, the Board ordered the Company to pay each Union's share of their agreed-upon costs for the off-site bargaining facilities. The Board also ordered the Company to pay local unit negotiators for working time lost while bargaining during the 1976-77 round of negotiations. The Board did so despite the fact that these items were agreed to or were bargained to impasse.

The Court of Appeals Decision

The parties herein filed a Joint Petition for Review and Cross-Application for Enforcement of the Board's Decision and Order, pursuant to Sections 10(e) and (f) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. Sec. 151, *et seq.*), in the United States Court of Appeals for the Fourth Circuit on September 29, 1980. The lower court in a 2-1 decision granted enforcement of the Board's Order (A. 3a).

The lower court majority accepted the Board's rationale that the Company was obligated, as a matter of law, (1) to create and grant a type of uncompensated leave to assure the presence at each plant of Union negotiators from the other plants, (2) to make plant premises available for negotiations with other plants' employees present, and (3) to pay local Union negotiators for wages lost while in negotiations.

The lower court also held, clearly incorrectly, that it "need not decide" the *H.K. Porter Co., Inc. v. NLRB* issue [6] because the Board's order did "not impose new contractual provisions" (A. 31a).

Senior Circuit Judge John A. Field, Jr., filed a dissenting opinion on two basic grounds.

1. Judge Field found that after following certain bargaining procedures for many years, *the Unions* started "a new and different ballgame" during which they could "not continue to play under the rules of the old game" (A. 33a). But, as he stated, "that is exactly what the Board has ordered and the majority unfortunately has approved" (A. 33a).

Judge Field further pointed out that both the Board and the lower court majority had conceded that the Company

> did not refuse to bargain with a committee containing "outsiders", but merely declined to continue ... negotiating on plant premises and ... paying local employee negotiators. The majority concedes that an employer has no duty to do either of these things, ... [A. 33a.]

Judge Field also noted that

> The company and the union negotiated with respect to the ... site of the bargaining sessions, and the parties agreed upon the site as well as the sharing of the costs of such facilities. [A. 33a.]

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[6] 397 U.S. 99 (1970).

In sharp disagreement with these inconsistencies in the majority's findings, Judge Field stated:

> Despite this fact [negotiating and agreeing as to situs] the majority concludes that the company must not only make its premises available for future negotiations, but must reimburse the union for the rental cost which the union had agreed to pay incident to the 1976 bargaining sessions. [A. 33a.]

2. Judge Field's second ground of dissent related to the *NLRB v. American National Insurance Co.*[7] and *H.K. Porter, supra,* issues. Judge Field correctly asserted:

> The Board's order forces Procter and Gamble to capitulate on three bargaining issues—make the plant premises available for negotiations, pay local employee negotiators, and grant employees uncompensated leave to participate in negotiations at another company plant. I agree with counsel for the employer that such forced capitulation is beyond the Board's remedial power and flies in the face of *H.K. Porter Co., Inc. v. National Labor Relations Board,* 397 U.S. 99 (1970), by compelling Procter and Gamble to agree to a proposal of the union and requiring that it make concessions on bargainable issues. I am in accord with the observation of Judge Wood in *National Labor Relations Board v. Indiana and Michigan Electric Company,* 599 F.2d 185, 192 (1979) that "the union camel has been constantly circling the company tent probing for a way to stick its nose under [and] [n]ow the Board itself has indirectly lifted the edge of the tent to make it easy". In my opinion the Board has no authority whatever to punish a company because it opposes a union, nor does it have the authority to force a company to facilitate the unions' efforts to attain their objectives. [A. 33a-34a.]

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[7] 343 U.S. 395 (1952).

V.

REASONS FOR GRANTING THE WRIT

A. The Decision Below Raises An Important Recurring Issue Of Law Which Has Not Been, But Should Be, Resolved By This Court

This case presents a significant,[8] unresolved issue of whether an employer has a statutory obligation to create and grant leave from scheduled work for employees in one bargaining unit to negotiate labor contracts for different bargaining units represented by other Unions, where the Board and the court below expressly found that the Company's denials of Union leave requests for precisely the same purpose were lawful under each plant's contract. The issue is *statutory* because the Board and lower court specifically found that the Company correctly applied the *contractual* Union leave provisions.

It is essential to comprehend the overreaching nature of this order with respect to creating a new leave of absence provision. The Board and lower court have held that each of the three plants *not* involved in the negotiations taking place at the fourth plant, nonetheless have a bargaining obligation to create some form of leave that will benefit *not* their own bargaining unit, but rather will benefit a separate bargaining unit at the plant where negotiations are being conducted.

One of the fatal errors in this order is that it violates one of the most fundamental principles governing the *scope* of the statutory bargaining obligation. It ignores the established principle that *the parameters of the bargaining unit define the limits of the bargaining obligation.*

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[8] The importance of the Union leave issue here is shown by the prevalence of those provisions in collective bargaining agreements. Nearly sixty percent (60%) of the agreements covering bargaining units each including at least 1000 employees contained some type of leave of absence for Union business. (See, "Characteristics of Major Collective Bargaining Agreements", U.S. Dept. of Labor, Bureau of Labor Statistics, Bulletin 2013 (1979).) Thus, the Board's *per se* rule in this case has a profound and widespread impact.

This Court has defined the bargaining obligation as "the duty to bargain unit by unit". *United Mine Workers of America v. Pennington*, 381 U.S. 657, 666 (1965). This Court elaborated on that principle in *Allied Chemical and Alkali Workers of America, Local Union No. 1*, 404 U.S. 157 (1971).

In *Allied Chemical*, after referring to the interrelationship of Section 8(a)(5), Section 8(d), and Section 9(a), this Court said:

> This obligation [to bargain collectively] extends only to the "terms and conditions of employment" of the employer's "employees" in the "unit appropriate for such purposes" that the union represents. [404 U.S. at 164].

Thus, this Court agreed with the Sixth Circuit in *Allied Chemical*, both Courts stating that:

> It has repeatedly been held that the scope of the bargaining unit controls the extent of the bargaining obligation * * *. [404 U.S. at 165, quoting from 427 F.2d 936, 945.]

Totally inconsistent with its finding in this case, the Board, itself, has acknowledged that the bargaining obligation of Section 8(a)(5) is confined to the particular bargaining unit found appropriate under Section 9(a). Thus, in *Utility Workers Union of America, AFL-CIO, and Local 111, et al., (Ohio Power Co.)*, 203 NLRB 230, 238, *enf'd.* 490 F.2d 1383 (6th Cir. 1974), the Board held:

> The duty imposed ... by the ... Act ... to bargain collectively is predicated on the cardinal principle that the existing unit ... fixes the periphery of the bargaining obligation.

This means that each plant's bargaining obligation is owed solely to its own separate bargaining unit. Here the Company fulfilled that obligation. Each already had a Union business leave provision for attending to the business of that local Union only. The ALJ, the Board, and the lower court conceded this. They also conceded, as did the employees themselves, that the

leave requests at issue in this case were made to benefit bargaining units *other than their own.* Thus, for example, when the Board ordered the Baltimore plant to grant leave for its employees to help with Port Ivory's negotiations, it was necessarily finding a duty to bargain *at Baltimore, across unit lines,* for the sole benefit of the Port Ivory bargaining unit. It is also noteworthy that when Port Ivory was negotiating, the Baltimore contract was not even open for re-negotiation.

The Board, itself, has held that there is no statutory right on the part of a Union to obtain leave for its members to engage in bargaining, even within their own bargaining units. *Borg-Warner Controls,* 198 NLRB 726, 729 (1972); cf. *Stoddard-Quirk Manufacturing Co.,* 138 NLRB 615 (1962).[9] That being true, certainly, there can be no statutory right to obtain leave to bargain for *other* Unions in *separate* units at *other* locations. Nevertheless, the Board, with the lower court's approval, has ordered the Company here to create and grant some form of uncompensated leave to bargain on behalf of employees who are members of different units. Moreover, they have done this despite their finding that the Company correctly interpreted the negotiated Union leave provision in effect at each plant as limiting leave to attending to the business of the particular Union at that plant. The Board further found that bargaining for a different unit was *not* local Union business, and hence was not covered by this contractual provision (A. 97a).

Absent the statutory obligation, which does not exist, these two contractual findings cannot be reconciled with the Board's order that uncompensated leave must be granted here.

Therefore, the Board's finding, some 35 years after the Act's passage, of a new statutory obligation to grant leave across unit lines is in flagrant violation of the explicit limits in Sections 8(a)(5) and 9(a) of the Act, as this Court has implemented it. Clearly, this finding is not permissible.

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[9] Neither the ALJ nor the Board announced any disagreement with these holdings.

Thus, in addition to admitting that there is no statutory right to obtain Union leave, even within the bargaining unit, the Board and lower court further concede that in this case the contractual Union leave provisions did not provide for the leave requested. Given these two conditions, we submit that there is no basis[10] for imposing upon the employer a duty to create and grant some new form of leave for employees to travel to other plants and bargain for entirely separate units represented by separate Unions.[11]

Yet, the Board and lower court found that the failure to create and grant a wholly new kind of leave, not even requested by the Unions, was unlawful (A. 103a; 13a).[12] Their theory was that the Company should have "created", or at least taken "the first shot" at creating, some other form of leave to accommodate the Unions (A. 14a). This finding is even more irrational in that the issue did not appear in any of the complaints, nor was it ever litigated.

The Board and lower court seek to equate the "right" to Union leave with the acknowledged right of a Union to select its own bargaining agent. The equation is faulty. There is no

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[10] In an attempt to find a contractual basis, the lower court went beyond its function as a reviewing court when it combed the record to find that contracts of two plants contained provisions for *personal leave* which "could easily cover" the leave requested here (A. 13a). No employee requested personal leave. These provisions were not mentioned in the complaints nor litigated before the Board. The meaning and application of these personal leave provisions were never determined. (Had the issue been raised before the Board, and litigated, the evidence would have shown that personal leave had been granted only for compelling personal and family crises.) In fact, there is *no* personal leave provision in Baltimore's contract. Yet, the court majority relies heavily on those provisions to argue that the Board was not dictating substantive contract provisions in violation of *H.K. Porter* (A. 13a-14a).

[11] In any event, although at the beginning of negotiations at Port Ivory, the Unions were aware of the plant managements' interpretation of the Union leave provision, they never attempted to negotiate an expanded leave provision as the successive contracts came open in 1976-1977.

[12] The Board did not give the employer an option to grant vacation days instead of Union leave. The use by the Board of the term "and/or", in referring to granting Union and/or vacation leave (A. 107a), can be construed as meaning that the Unions could demand *either* or *both* of them.

issue here of the right of the Unions to select their own bargaining representatives and to compose mixed negotiating committees. Instead, the question is their right to obtain the creation of a new Union leave provision granting leave to serve only the interests of *other* bargaining units, contrary to the Union leave provisions already in their collective bargaining agreements. Thus, the cases principally relied upon by the Board and the court below are not on point. They are the traditional cases dealing with the right to include non-employees on the Union's bargaining committee. *Standard Oil Co. v. NLRB*, 322 F.2d 40 (6th Cir. 1963); *Minnesota Mining and Manufacturing Co. v. NLRB, supra; General Electric Co. v. NLRB, supra.* Since it is admitted that the Company met and bargained to agreement with the four Unions' mixed negotiating teams, obviously the Company never challenged the Union's right to select its bargaining agent.

The Court of Appeals and the Board also placed inappropriate reliance on the Seventh Circuit decision in *NLRB v. Indiana & Michigan Electric Co.*, 235 NLRB 1128 (1978), supplementing 229 NLRB 576 (1977), *enf'd.* 599 F.2d 185 (7th Cir. 1979), *cert. denied* 444 U.S. 1014 (1980).

There are at least two significant differences between that case and the instant case. In *Indiana & Michigan*, the four contracts contained *no* Union leave provision that restricted leave to the business of the contract bargaining unit. Moreover, there *was* a past practice of freely granting leave to employees, who were all members of the same local Union, to attend and participate in one another's negotiations. Here the facts are directly opposite.[13] Thus, *Indiana & Michigan* cannot be said to have even remotely resolved the important issues here.

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[13] Indeed, the record shows that the Union leave provision was submitted to arbitration at Dallas, and the Arbitrator agreed that it did not provide for leave to assist another unit in its contract negotiations. This award was one of the grounds cited by the ALJ in his finding that the employer correctly denied the requested Union leave (A. 58a). Thus, employees who requested Union leave to attend the initial bargaining session at Port Ivory could hardly have been surprised when their requests were denied. Even though the Board has agreed with the Arbitrator's ruling that the Company correctly interpreted the contractual leave provisions, it now directs the Company to rewrite the contracts by granting "some alternate form of uncompensated leave" (A. 103a).

B. The Decision Below Raises A Conflict Between The Fourth And The Sixth Circuits

The decision below is in sharp conflict with the decision of the United States Court of Appeals for the Sixth Circuit in *Grief Bros. Corporation v. NLRB*, 635 F.2d 531 (6th Cir. 1980). In *Grief Bros.*, the Board held that the employer interfered with the protected concerted activity of its employees when at twenty-one (21) different plants it denied them unpaid leave to attend an international union conference. The Board and the court found that the employer had freely granted both union and personal leave in the past. They also found that the employer had based its denial upon its opposition to coordinated bargaining, which was the subject matter of the conference. Further, they found that the employer gave no other business justification for its leave denial.

The Sixth Circuit denied enforcement, holding that neither the employer's departure from its established leave policy because of its objection to coordinated bargaining, nor its failure to rely upon business necessity for its leave denial, justified the Board's finding of a violation of the Act.[14] The lower court was made aware that *Grief Bros.* directly contradicted the Board's decision, but the majority did not address the case.

Although *Grief Bros.* deals only with the Union leave issue, the doctrine enunciated therein is also applicable to the Board's order concerning the plant access rule, pay for negotiators, and pay for bargaining facilities. The Sixth Circuit's decision in *Grief Bros.* was based upon *H.K. Porter's* principles, and stands

[14] The Sixth Circuit cited its own previous decision in *NLRB v. Superior Co.*, 199 F.2d 39 (6th Cir. 1952), as controlling. In *Superior Co.*, despite a past practice of liberally granting leave, the court held that the employer was justified in refusing to grant leaves of absence for employees to serve on a union committee at an informal conference between the employer and the Board prior to a consent election. The employer had notified the Board that it would meet only with it, and not with the union, and the Board had not requested the employees' presence. See also, *Service Employees International Union v. NLRB*, 600 F.2d 930 (D.C. Cir. 1979).

for the same tenet that Judge Field states in his dissent in the case at bar:

> [T]he Board has no authority whatever to punish a company because it opposes a union, nor does it have the authority to force a company to facilitate the union's efforts to attain their objectives.

C. The Decision Below Conflicts With Landmark Decisions Of This Court Denying The Board Authority To Dictate The Substantive Terms And Conditions Of Employment

The Board order in this case conflicts with the decision of this Court in *NLRB v. American National Insurance, Co., supra,* and *H.K. Porter Co., Inc. v. NLRB, supra.*

American National Insurance first established, contrary to the then-prevalent view of the Board, that it is not within the province of the Board to intrude upon the collective bargaining process and attempt to dictate the substantive terms and conditions of employment. The Board had ordered that employer to withdraw a demand for a broad management rights clause which would have committed to the unilateral control of the management some significant decisions relating to working conditions, such as promotions and layoffs, and excluded these matters from arbitration.

Emphasizing the essential freedom of the collective bargaining process, this Court upheld the employer's right under the Act to make and to insist to impasse on this proposal, and rejected the Board's authority to order its withdrawal. This Court admonished the Board not to attempt, under the guise of remedying an unfair labor practice,

> either directly or indirectly, [to] compel concessions or otherwise sit in judgment upon the substantive terms of collective bargaining agreements. [343 U.S. at 404.]

But the Board does not learn its lessons easily. Several years later, in *H.K. Porter,* the Board strayed from this Court's admonition in *American National Insurance.*

In *H.K. Porter*, the employer had refused to grant a checkoff provision. The Board, the lower court, and this Court found that the employer in that case had bargained in bad faith on the dues checkoff proposal. The Board's remedial order to grant the checkoff provision was enforced by the lower court. Yet, again, this Court said "no" to the Board's "remedy".

Even though he agreed that the employer had acted in bad faith, Justice Black, writing on behalf of the Court majority, reminded the Board of the fundamental rule of *American National Insurance*. Mr. Justice Black cogently stated:

> [W]e do not agree that . . . the remedial powers of the Board are not also limited by the same considerations that led Congress to enact § 8(d) . . . One of these fundamental policies is freedom of contract. . . .
>
> In reaching its decision the Court of Appeals relied extensively on the equally important policy of the Act that workers' rights to collective bargaining are to be secured . . . . But the Act . . . does not contemplate that unions will always be . . . able to achieve agreement. . . . It may well be true . . . that the present remedial powers of the Board are insufficiently broad to cope with important labor problems. But it is the job of Congress, not the Board or the courts, to decide when and if it is necessary to allow governmental review of proposals for collective-bargaining agreements and compulsory submission to one side's demands. The present Act does not envision such a process. [*Id.*, 397 U.S. at 107-09.]

Yet, the Board's decision here does even more than was forbidden by this Court in *H.K. Porter*. Here, although a Union leave provision existed which admittedly did not provide for the leave requested, the employer is ordered to create and grant "an alternative form of uncompensated leave" (A. 103a) to suit the Unions' objectives. Moreover, the Board and lower court ordered the Company, *in futuro*, to open up its premises to non-plant personnel, to pay Union negotiators, and to pay the full cost of any joint bargaining facilities where there is a mixed negotiating committee.

The ALJ, the Board and the court below acknowledged, as they must, that the Union had no statutory right to bargain on plant premises or to receive pay for Union negotiators (A. 96a). *McCulloch Corporation*, 132 NLRB 201, 205 (1961); *NLRB v. Babcock & Wilcox, Co.*, 351 U.S. 105, 112-14 (1956); *Hudgens v. NLRB*, 424 U.S. 507 (1976). But, they have held precisely the opposite here.

On the issues of the situs of bargaining and pay for negotiators and facilities, the parties bargained either to agreement or to impasse. The lower court says that the Unions' agreement to the ground rules was a "forced agreement", but where is the evidence of force? The court did not define what constitutes a "forced agreement". Under *Axelson, Inc., Subsidiary of U.S.A. Industries, Inc. v. NLRB*, 599 F.2d 91, 95 (5th Cir. 1979), enforcing 234 NLRB 414 (1978), these ground rules are subjects of mandatory bargaining. Thus, the parties must bargain about pre-negotiating issues, but no one is required to yield. The Unions had the option of saying "no". They all chose to agree—some under protest and others without qualification. Agreement made under protest is no less an agreement. That is the essence of bargaining. Accordingly, the employer did not obligate itself to pay for negotiators or for facilities, and the Board may not order such an agreement.

The lower court's handling of the *H.K. Porter* issue is truly inexplicable. The court majority attempted to circumvent this issue by holding that "the prohibition simply does not impose new contractual provisions on the parties" (A. 31a). The lower court appeared to perceive a difference between what the Board did here—which was to order the Company to "*cease and desist from*" the *negative* acts of denying Union leave, refusing to bargain on plant premises, and refusing to pay negotiators—and what the Board was prohibited from doing by *H.K. Porter*, which was to *affirmatively* direct the Company to grant leave, to bargain on plant premises, and to pay negotiators. Seemingly, the lower court misconstrued *H.K. Porter* as prohibiting only the latter form of Board order directly imposing contractual provisions on the parties. But this is obviously a distinction without a difference. To order one to *cease and desist from refusing* to do something is effectively the same as

ordering one to do that same thing. Despite the lower court's simplistic denial of an *H.K. Porter* problem, the order here does require the Company to grant Union leave, to bargain on plant premises, and to pay negotiators.

True, the Board did not say "put this in an agreement". However, the Board did impose these conditions as contract equivalents. It must be noted that in *American National Insurance* the Board likewise ordered nothing inserted in a contract. Instead, the Board simply ordered the employer *to cease and desist in making its management rights proposal.* Yet, this Court found that order, too, was in excess of the Board's power to order "good faith bargaining".

Moreover, what the Board has ordered in this case constitutes an even broader invasion of an employer's rights than did the Board's order in *H.K. Porter* or *American National Insurance.* Here, the order not only is contrary to and changes the terms of the collective bargaining agreements, but also is outside the restrictions negotiated in the agreements, such as the no-strike or the grievance-arbitration provisions.

What the lower court majority failed to understand was that even if it were assumed, *arguendo,* that the Company committed unfair labor practices in dealing with the issues of Union leave, pay for negotiators, and situs of bargaining (which is the parallel to *H.K. Porter*'s bad faith bargaining), the only appropriate remedy in a refusal to bargain case is to order the Company to negotiate in good faith on these issues. An order dictating specific terms is clearly beyond the authority of the Board, despite its phrasing in "cease and desist" language.

Dissenting Judge Field saw the conflict with *American National Insurance* and *H.K. Porter* quite clearly:

> [This decision] flies in the face of *H.K. Porter* . . . by compelling Procter and Gamble to agree to a proposal of the union and requiring that it make concessions on bargainable issues.

On this ground alone, this Petition should be granted.

VI.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Fourth Circuit Court of Appeals.

Respectfully submitted,

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June 3, 1982

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 80-1275

THE PROCTER & GAMBLE MANUFACTURING COMPANY,
Port Ivory, New York Plant;
Kansas City, Kansas Plant; Dallas, Texas Plant;
Baltimore, Maryland Plant,
Petitioners,

versus

NATIONAL LABOR RELATIONS BOARD,
Respondent.

Appeal from an Agency Review by the National Labor Relations Board

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Argued December 4, 1980. Decided September 4, 1981

Before HAYNSWORTH and FIELD, Senior Circuit Judges and PHILLIPS, Circuit Judge.

Guy Farmer (Farmer, Wells, McGuinn, Flood and Sibal; Harry L. Browne, James G. Baker, Spencer, Fane, Britt and Browne; Harold S. Freeman, Gregory L. Hellrung, Dinsmore, Shohl, Coates and Deupree on brief) for Petitioners; R. Michael Smith (William A. Lubbers, General Counsel, John E. Higgins, Jr., Deputy General Counsel, Robert E. Allen, Acting Associate General Counsel, Elliott Moore, Deputy Associate General Counsel on brief) for Respondent.

PHILLIPS, Circuit Judge:

This case is before us upon the petition of Procter & Gamble Manufacturing Company (Procter & Gamble) to review and set aside a decision and order of the National Labor Relations Board (Board) and upon the Board's cross-application for enforcement of its order. *Procter & Gamble Manufacturing Co.*, 248 N.L.R.B. No. 119 (Apr. 4, 1980).

Procter & Gamble is a national manufacturer with its headquarters in Cincinnati, Ohio. This case involves four Procter & Gamble plants—Port Ivory, New York, Kansas City, Kansas, Dallas, Texas, and Baltimore, Maryland—and the four independent unions representing employees at these plants.[1] The four unions eventually want to bargain with Procter & Gamble on a multiplant basis.[2] As a step towards this goal, each union, during its collective bargaining agreement's renewal negotiations in 1976 or 1977, attempted to include members of the other three unions on its bargaining committee. Procter & Gamble clearly is opposed to multiplant bargaining and, therefore, it sought to discourage the participation of such "outsiders"[3] in the negotiations.

The unions filed charges with their respective regional Board offices, alleging that Procter & Gamble committed numerous unfair labor practices during the 1976-77 contract renewal cycle. The charges were transferred to the Brooklyn, New York Regional Office, complaints issued, and the cases consolidated before an Administrative Law Judge (ALJ). The ALJ concluded that Procter & Gamble violated subsections 8(a)(1), (3), and (5) of the Act, 29 U.S.C. §158(a)(1), (3),

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[1] The unions are: Independent Oil & Chemical Workers, Inc. (Port Ivory); Independent Oil & Chemical Workers of Kansas City, Kansas; Independent Oil & Chemical Workers of Dallas; and Independent Oil & Chemical Workers (Baltimore).

[2] Multiplant bargaining is collective bargaining between an employer and the union(s) representing employees in more than one plant of that employer. It results in a single contract.

[3] "Outsiders" is the term used by the parties and the Board and adopted by this court to refer to employees at the other three Procter & Gamble plants whom the negotiating union invited to participate as its bargaining representatives.

(5), by engaging in a concerted course of conduct at all four plants which effectively foreclosed the unions' selected outside bargaining representatives from participating in the contract negotiations. He also found unfair labor practices at individual plants. *Procter & Gamble Manufacturing Co.*, No. JD-608-79 (Aug. 31, 1979) (*appended to* 248 N.L.R.B. No. 119) (Jt. App. at 980). The Board affirmed the ALJ's rulings, findings, and conclusions and adopted his recommended order with slight modification. 248 N.L.R.B. No. 119 (Jt. App. at 1094).

In its petition to this court, Procter & Gamble raises four major objections: (1) the Board erred in finding any unfair labor practices; (2) several allegations are barred by the six-month limitation in subsection 10(b) of the Act, 29 U.S.C. §160(b); (3) the Board erred in issuing one decision and order for the four distinct plants and unions when there was no single consolidated complaint; and (4) the Board's conclusions, order and notice are too broad. We consider these objections in order and, for the reasons that follow, we find them without merit. Accordingly, except for that portion of the Board's order directing Procter & Gamble to sign the now expired 1977 Kansas City agreement, we grant enforcement.

I

The following facts are supported by substantial evidence on the record. Each of the unions involved in this case is an independent labor organization and the recognized bargaining representative for the employees at its respective plant. For numerous years, each union has negotiated and executed collective bargaining agreements for its unit. Before 1976-77, each union was represented at contract negotiations by a bargaining committee composed solely of its members, although the union's attorney occasionally attended the bargaining sessions too. Negotiations were held at the plant and Procter & Gamble paid the employee negotiators for the work time they lost while in negotiations.

In 1968, several independent unions representing Procter & Gamble employees formed an "Amalgamation," which by

1971 consisted only of the four unions in this case.[4] One of the Amalgamation's aims is to establish a multiplant bargaining unit. At the Amalgamation's September 1975 meeting, the four unions decided to further this goal by including the outsiders on their bargaining teams during the upcoming contract renewal negotiations. This was, however, the only contemplated change in bargaining procedure. The Amalgamation's proposed plan was published in the Port Ivory union's October 7, 1975 bulletin; thus by early 1976, Procter & Gamble was alerted to the unions' plan.

The four contracts expired on different dates. Renewal negotiations accordingly began at Port Ivory on October 6, 1976, at Kansas City on January 9, 1977, at Dallas on March 25, 1977, and at Baltimore on July 18, 1977. Upon learning of the unions' plan to include outsiders, Procter & Gamble management at each plant responded in a nearly identical manner shortly before negotiations were to begin. Initially management asserted that negotiations could not be held on the plant premises because each plant had a security, or access, rule which restricted any visitors, including employees from other Procter & Gamble plants, from entering the plant except on a guided tour. Management then suggested that, as an accommodation to the union's insistence upon including outsiders, the negotiations could be held at alternative facilities, such as local motels, with the parties sharing the rental costs. In addition, Procter & Gamble would no longer pay local employee negotiators. Each union protested these changes but, because its contract was due to expire, the union eventually negotiated with Procter & Gamble under these forced conditions.

Each union managed to include three outsiders on its team for the opening negotiation session. The outsiders were introduced as members of the union's bargaining committee present to negotiate a contract for only that union. In each case management, using a series of prepared written questions

[4] Nine independent unions, including the four in this case, also compose a "Council" that meets annually to exchange information of common interest.

furnished by Procter & Gamble's industrial relations department at its Cincinnati headquarters, then asked the outsiders about their role and purpose in participating in the negotiations.[5]

The Port Ivory renewal negotiations serve as a detailed example of Procter & Gamble's concerted opposition to the outsiders. When the division manager, Philip Robinson, learned that the Port Ivory union intended to include outsiders, he consulted with Bob Larsen, a member of Procter & Gamble's industrial relations staff in Cincinnati, about the union's plan. Larsen informed Robinson that legally the union could select whomever it wanted to represent it in collective bargaining negotiations. He suggested, however, that since the union was making a change in its team composition, Procter & Gamble also could change the procedural ground rules. Larsen reminded Robinson of the plant's security rule.

Robinson then urged the Port Ivory union to use only local employees on its committee and to bargain as it had in the past. The union refused to comply or to name the outsiders who would participate. Consequently in September 1976, Robinson told the union that if it insisted on including outsiders, negotiations could not be held on the plant premises because of the security rule[6] and that Procter & Gamble would not pay employee negotiators. The union responded that it had no choice but to hold the negotiations outside the plant and offered its union hall as an alternative site. Procter & Gamble refused to meet at the union hall, so negotiations were held at various local motels with the parties sharing the rental cost of the facilities.

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[5] The questions, while not identical in all cases, covered the following matters: (1) each outsider's name, address, and at what plant he was employed; (2) if he was in the local union; (3) if he was a member of another union and if he held an office in that union; (4) who he was present to represent—the local union or another one; (5) what was his role and purpose in the present negotiations; (6) had he had any prior involvement with the local union; and (7) by what process or authority he was invited to the negotiations.

[6] Robinson acknowledged that, in the past, union attorneys had participated in bargaining sessions held on the plant premises.

At the first meeting on October 6, 1976, three outsiders were present: Omer Jones (Kansas City), Hoyt Middlebrooks (Dallas), and Raymond Bramble (Baltimore). Port Ivory union president, Ken McCauley, introduced the three as members of the union's bargaining committee and stated that they were present to negotiate a contract for only Port Ivory. Robinson then asked each outsider the series of prepared written questions received from Larsen about their role and purpose in participating in the bargaining. After his interrogation, Robinson adjourned the meeting to study the ramifications of having outsiders present. Thirteen additional sessions were held in which outsiders did not participate and an agreement was reached and signed on November 16, 1976.

At Kansas City, Dallas, and Baltimore, the same sequence of events unfolded: management refused to hold negotiations on the plant premises if outsiders participated because of the security rule and it discontinued paying local employee negotiators; the unions protested these changes but eventually agreed to meet at local motels, thereby incurring half the rental cost of these alternative facilities; and at each opening session, the Procter & Gamble representative asked the outsiders the questions furnished by the industrial relations staff even though the outsiders had been introduced as members of the negotiating union's bargaining committee.

Aside from the opening session for each plant and one afternoon session of the Dallas negotiations, outsiders did not otherwise participate in the bargaining.[7] Because negotiations were held during weekday working hours, outsiders had to obtain some form of leave in order to attend any sessions and as the negotiations progressed, this became increasingly difficult.

The outsiders' efforts to obtain leave commenced when the Port Ivory negotiations opened in early October 1976. In order to participate, outsiders from Kansas City, Dallas, and Baltimore requested union business leave as provided in their

[7] The outsiders had to resort to various means simply to attend the opening sessions: switching shifts, sending union officials already on vacation, or attending without leave.

effective collective bargaining agreements. The wording in each contract was nearly identical: "By agreement between the Plant Manager and the Union, leaves of absence without pay up to thirty (30) days per year may be granted for the purpose of attending to Union business." (Jt. App. at 378-79 (Baltimore). *See* Jt. App. at 174 (Port Ivory); 375 (Dallas); 991 (Kansas City).) Although the preamble to each contract defined "union" as the contracting labor organization for that agreement, union officials in Kansas City and Baltimore anticipated using union business leave to participate as outsiders because in the past they had obtained such leave to attend Amalgamation and Council meetings and to visit government officials as well as to attend to their local union's affairs. Officials of the Dallas union were not so optimistic. In 1975, one official had requested union business leave in order to go to Procter & Gamble's plant in Alexandria, Louisiana to explain the Dallas contract to the Alexandria union membership. Dallas management denied the request because the leave did not relate to the Dallas union's business. The denial was grieved and resulted in arbitration upholding management's position. *Procter & Gamble Manufacturing Co. v. Independent Oil & Chemical Workers of Dallas*, (Jan. 5, 1978) (Yarowsky, Arb.) (Jt. App. at 808).

Managers at Kansas City, Dallas, and Baltimore denied the requests for union business leave to attend the Port Ivory negotiations because they now uniformly interpreted the union leave provisions to cover only local union affairs, which did not include representing the Port Ivory union. The Dallas industrial relations manager further warned his employees that they would be disciplined if they used union leave to negotiate at Port Ivory. When Port Ivory union officials later requested union leave to participate in the Kansas City negotiations, their personnel manager said that if they went to Kansas City, there would be "serious repercussions" and if they actually used union leave for that purpose, they would be disciplined. The Baltimore plant manager also told his employees that no leave would be granted to attend the Kansas City or Dallas bargaining sessions. Outsiders consequently gave up requesting union business leave.

Outsiders next requested vacation leave for days on which negotiations were scheduled. On October 13, 1976, the Baltimore union president, Walter Donnellon, requested a one-day vacation for October 15 when a Port Ivory bargaining session was to be held. His request was denied because a purported departmental policy, with which Donnellon was unfamiliar, required ten-days advance notice for vacation leave.[8] Substitute workers apparently were available. Donnellon also asked two other Baltimore employees to request vacation leaves for October 15; their requests were granted. Donnellon grieved the leave denial, the supposed policy was abandoned, and Donnellon subsequently received vacations on one day's notice.

Omer Jones (Kansas City) and Roger Hatton (Dallas) also requested vacation leave in order to participate in the bargaining at Port Ivory. Jones' request was denied because another employee already was scheduled for vacation at that time. Hatton's request was denied because no substitute was available.

Despite difficulties in obtaining vacation leave, Omer Jones requested leave, on March 24, 1977, for the following day when negotiations were scheduled for Dallas. Although Jones' supervisor had told him a week earlier that one day's notice was sufficient, Jones' vacation request was denied because of the short notice. Substitute workers were available.

Because the outsiders could not obtain any form of leave, the union engaged in negotiations asked its management to meet evenings or weekends when outsiders could attend without leave. Except for the opening session at Kansas City which was held on a Sunday, Procter & Gamble refused to meet at these times.

Based on these facts, the Board found that Procter & Gamble made a concerted effort to discourage participation by outsiders. First, if the unions had not attempted to include

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[8] When the Baltimore plant manager denied Donnellon's vacation leave request on October 13, he also informed Donnellon that the Port Ivory bargaining session scheduled for October 15 had been cancelled. The Port Ivory union did not even learn of the cancellation until October 14.

outsiders, management at all four plants would have continued the past practices of negotiating on the plant premises and of paying local employee negotiators. Although an employer has no statutory duty to do either, the Board found that discontinuing these practices was simply retaliation over the unions' selection of outsiders as their bargaining representatives. The assertion that the plants' security rules necessitated meeting off the premises was a mere pretext to impede the unions, particularly since union attorneys had attended previous bargaining sessions held at the plant. Thus, the Board concluded that Procter & Gamble violated subsections 8(a)(1) and (5) of the Act, 29 U.S.C. § 158(a)(1), (5), and ordered it to cease and desist from refusing to make its plant premises available or to pay local employee negotiators because the union invited persons outside the bargaining unit to participate in contract negotiations. The Board also affirmatively ordered Procter & Gamble to reimburse each union for sums expended to rent alternative meeting facilities in 1976-77 and to pay the local employees for the work time they lost negotiating in 1976-77.

The Board next found that Procter & Gamble's interpretation of the union business leave provisions as limited to local union business was reasonable. Accordingly it dismissed allegations that such leave denials were unlawful and that the Dallas and Port Ivory managements had unlawfully threatened to discipline employees if they misused union leave to participate in another union's negotiations.

The Board, however, found that Procter & Gamble's denial of vacation time or some alternative form of uncompensated leave to its employees so they could attend negotiations elsewhere while management simultaneously refused to bargain evenings or weekends effectively precluded outsider participation. Recognizing that the georgraphic distances between the plants made evening or weekend sessions impracticable, the Board concluded that simply the leave denials prevented the unions from selecting their bargaining representatives and violated subsections 8(a)(1) and (5) of the Act. In drawing this conclusion the Board relied heavily upon the Seventh

Circuit's decision in *NLRB v. Indiana & Michigan Electric Co.*, 599 F.2d 185 (7th Cir. 1979), *cert. denied*, 444 U.S. 1014 (1980). The Board ordered Procter & Gamble to cease and desist from denying uncompensated leave and/or vacation time.

On appeal, Procter & Gamble contends that the Board erred in finding it made an orchestrated effort to dissuade the unions from including outsiders on their bargaining committees, because it actually met with the unions' full committees and negotiated contracts. This is all that subsection 8(d) of the Act requires.[9] Procter & Gamble also raises objections to the Board's specific findings on the issues of meeting on the plant premises, paying the local employee negotiators, and denying leaves.

At the outset, we note that section 7 of the Act, 29 U.S.C. § 157, guarantees employees the right "to bargain collectively through representatives of their own choosing . . . ."[10] While the Supreme Court has recognized this right as fundamental to the statutory scheme, *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 33 (1937), it is not absolute: the employer may refuse to negotiate with the union bargaining committee if he can carry the heavy burden of showing that the selected representatives present a clear and present danger to the collective bargaining process. *IBEW v. NLRB*, 557 F.2d 995, 998 (2d Cir. 1977); *NLRB v. David Butterick Co.*, 399 F.2d 505, 507 (1st Cir. 1968); *Harley Davidson Motor Co.*, 214 N.L.R.B. 433 (1974). This rule requires the employer to show exceptional circumstances—such as bad faith or ulterior motive—underlying the union's choice of its bargaining team members. Mere inclusion

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[9] Subsection 8(d) of the Act, 29 U.S.C. § 158(d), provides in pertinent part that

> to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times, and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, ...

[10] The employer has a corresponding right in subsection 8(b)(1)(B) of the Act, 29 U.S.C. § 158(b)(1)(B).

of persons outside the negotiating unit does not constitute exceptional circumstances. *Indiana & Michigan Electric*, 599 F.2d 185 (other units); *Minnesota Mining & Manufacturing Co. v. NLRB*, 415 F.2d 174, 177-78 (8th Cir. 1969) (other locals); *General Electric Co. v. NLRB*, 412 F.2d 512, 517-20 (2d Cir. 1969) (other international unions); *Standard Oil Co. v. NLRB*, 322 F.2d 40, 44 (6th Cir. 1963) (other locals). Further, the employer's claim that the union's use of outsiders is an unlawful attempt to compel companywide or multiplant bargaining also is insufficient unless the employer can demonstrate that the union actually attempted to bargain outside unit boundaries. *Indiana & Michigan Electric*, 599 F.2d at 191; *Minnesota Mining*, 415 F.2d at 178; *General Electric*, 412 F.2d at 519-20.

In this case, Procter & Gamble did not refuse to bargain collectively with the unions' committees and the unions did not engage in multiplant bargaining without Procter & Gamble's consent. Each round of bargaining and the resulting agreement were confined to a single plant. Thus, the Board properly found that the unions' "coordinated bargaining"[11] presented no clear and present danger to the collective bargaining process. This case, however, does raise the issue of whether Procter & Gamble violates the Act by engaging in conduct which effectively chills its employees' right to select their own bargaining representatives by preventing or discouraging those representatives from fully participating in the negotiations. The Board concluded, and we affirm, that Procter & Gamble's conduct at all four plants constitutes such a violation.

First, Procter & Gamble seeks to justify its unilateral changes in bargaining procedure—discontinuing negotiations on the plant premises and pay for local employee negotiators—on several grounds: the plant security rules are valid, longstanding, and not applied discriminatorily; there is no statutory obligation to meet at the plant; alternative sites were

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[11] "Coordinated bargaining is a negotiating technique whereby a union coordinates its bargaining with other unions or other bargaining units by including on its negotiating panel members of such other unions or bargaining units." *Indiana & Michigan Elec.*, 599 F.2d at 190 n.4. The resulting contract is only for one union or unit.

available; meeting elsewhere was an accommodation to the unions; and the unions mutually agreed to the changes. The Board found, however, that Procter & Gamble used its security policy as a mere pretext and really instituted these changes as retaliation over the union's inclusion of outsiders. We must accept the Board's findings as conclusive because they are "supported by substantial evidence on the record considered as a whole . . . ." Subsections 10(e) and (f) of the Act, 29 U.S.C. § 160(e), (f); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 487-88 (1951); *Barrus Construction Co. v. NLRB*, 483 F.2d 191, 197 (4th Cir. 1973); *NLRB v. Aerovox Corp. of Myrtle Beach*, 435 F.2d 1208, 1209 (4th Cir. 1970). In prior years, union attorneys had attended negotiations in the plant without objection; it would be no more difficult to police three outside employees. Further, the unions clearly did not agree to the changes. They protested before negotiations began and they subsequently filed unfair labor practice charges alleging that Procter & Gamble's unilateral changes were unlawful. While an employer has no statutory obligation either to pay employee negotiators for lost work time or to negotiate on the plant premises—subsection 8(d) of the Act only mandates meeting at reasonable times and in good faith—and while an employer may have the right to exclude nonemployees from its plant for legitimate business reasons, *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 112-14 (1956), an employer cannot discontinue such longstanding practices where the effect is to interfere with, restrain, or coerce employees in the exercise of their § 7 rights. *Borg-Warner Controls*, 198 N.L.R.B. 726, 728, 730 (1972). Accordingly, we uphold the Board's findings and conclusions.

Second, Procter & Gamble raises numerous objections to the Board's order that it cease and desist from denying uncompensated leave and/or vacation time to outsiders. Procter & Gamble contends that an alternative form of uncompensated leave had never been requested, was never denied, and is not provided for in the contracts. The Board's order, therefore, imposes a new contractual term upon the parties without their bargaining over it and, in effect, requires Procter & Gamble to insure that its employees from one plant are available for negotiations at another. Further, because the Board placed no

limitations upon this uncompensated leave, the Company's business operations may be disrupted seriously. Finally, Procter & Gamble contends that the Board's reliance on *Indiana & Michigan Electric*, 599 F.2d 185, is misplaced because the two situations are factually distinct and the Board's ruling in this case goes far beyond the Seventh Circuit's decision.

We affirm the Board's findings because they are supported by substantial evidence and we hold this remedy is within the Board's authority and discretion. Uncompensated leave was never requested or denied in 1976-77 because the union officials anticipated using either union leave to attend the negotiations—as they had used it in the past to attend Amalgamation and Council meetings—or vacation time. They soon found it futile, however, to seek any form of leave as their requests were denied because of purported departmental policies on advance notice or because the notice given was too short. While uncompensated leave to attend negotiations elsewhere was not explicitly provided for in the contracts, at least the Port Ivory and Dallas contracts in effect during the 1976-77 negotiations contained a personal leave provision:

> Upon application to his department manager or supervisor, with good and sufficient reasons, an employee shall, when plant conditions permit, be granted a leave of absence without pay for a reasonable length of time. Such request shall be made as far in advance as possible.

(Jt. App. at 174 (Port Ivory 1973 Agreement). *See also* Jt. App. at 375 (Dallas 1974 Agreement).)[12] Surely serving as a bargaining representative for another union, when substitute workers are available, is a good and sufficient reason for uncompensated leave and easily could be covered by the personal leave provisions. Procter & Gamble also should not be heard to complain about the Board's decision not to define the form of such uncompensated leave. The above personal

[12] Complete copies of the other agreements were not included in the Joint Appendix so it is impossible to determine whether or not they contain personal leave provisions.

leave provision apparently only limits the number of employees requesting uncompensated leave to the number at which plant operations will not be disrupted; it limits the duration of such leave to a "reasonable length of time"; and it states nothing about the frequency of such leave requests. These are the very factors which Procter & Gamble contends are problems with the Board's alternative remedy of uncompensated leave in this case. Obviously they cannot be so problematic. Further, Procter & Gamble has the first shot at placing limits on uncompensated leave as long as its limits do not interfere with employees' statutory rights, and particularly with their choice of bargaining representatives. Procter & Gamble also has some leeway to grant employees vacation time or to meet evenings or weekends rather than to grant any uncompensated leave, although utilizing these options necessarily is limited because of the geographic distances involved. There is no indication that the uncompensated leave remedy will be abused in a manner disrupting Procter & Gamble's business operations. That Procter & Gamble may limit such leave for valid business reasons or choose other alternatives demonstrates the contrary. Procter & Gamble's options also demonstrate that the Board's order does not impose a new contractual provision upon the parties. The cease and desist order serves only to remedy the unfair labor practices found in this case, and as such, we hold that it is a proper exercise of the Board's wide discretion in fashioning remedies. *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 612 n.32 (1969); *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203, 216 (1964).

Finally, the Board's reliance on *Indiana & Michigan Electric*, 599 F.2d 185, is not misplaced. That case involved four plants within a small geographic area and four bargaining units of a local union, each plant and unit having their own contract. During the 1975-76 contract renewal cycle, the union, which eventually wants companywide bargaining, was represented by permanent union officials, employee members of the unit whose contract was being renegotiated, and "travelers"—employee members of the other three units. The Company had prior experience with travelers participating in initial sessions of the 1973 and 1974 negotiations. In 1975-76,

however, travelers sought leave to attend all scheduled meetings. The Company denied such requests because it thought the union was forcing multiplant bargaining and such extensive leaves would be burdensome to administer. The Company also refused to meet evenings or weekends. The Board found that the union did not engage in multiplant bargaining, but that the Company did violate subsections 8(a)(1) and (5) of the Act "by refusing to grant travelers uncompensated leave to permit them to engage in bargaining during working hours, while simultaneously refusing the Union's request to bargain during nonworking hours since its conduct interfered with the Union's right to select its own bargaining representatives." *Id.* at 189.

In our case, the Board found *Indiana & Michigan Electric* to be persuasive despite somewhat different factual settings. First, *Indiana & Michigan Electric* involved four separate bargaining units of one union; this case involves four independent unions. As discussed above, however, a union may select anyone to serve as its bargaining representative. Second, in *Indiana & Michigan Electric* the plants were within 133 miles of each other; in this case the plants are scattered across half the United States. Further, both companies denied leave requests and simultaneously refused to meet evenings or weekends. In *Indiana & Michigan Electric*, the Board gave the Company the option of granting uncompensated leave or meeting during nonworking hours. In this case, the logistical difficulties of meeting evenings or weekends when the plants are so widely scattered demonstrates, if anything, that it would be irrational for the Board not to order uncompensated leave as a cease and desist remedy.[13] Accordingly, we find that *Indiana & Michigan Electric* is persuasive authority for the Board's conclusions and order in this case.

Finding no error in the Board's findings and conclusions with respect to the subsection 8(a)(1) and (5) violations, we grant enforcement on this portion of the Board's order.

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[13] Procter & Gamble also seeks to distinguish *Indiana & Michigan Electric* because there was a history of travelers participating in contract negotiations and there was no union business leave provision in the parties' contracts. We see no significance in these distinctions.

II

The Board concluded that Procter & Gamble violated subsections 8(a)(1) and (3) of the Act, 29 U.S.C. § 158(a)(1), (3), by denying vacation leave to Walter Donnellon (Baltimore union president) and to Omer Jones (Kansas City union president) in order to prevent them from participating in negotiations at Port Ivory and Dallas, respectively. The Board's findings are supported by substantial evidence. Donnellon's vacation leave request for October 15 was denied because of a purported departmental policy requiring ten-days advance notice. Donnellon was unfamiliar with this new policy and it was not applied to other Baltimore employees requesting leave for the same day. The Baltimore plant manager also clearly knew when the Port Ivory negotiations were scheduled because he told Donnellon that the October 15 session was cancelled a day before the Port Ivory union learned of the cancellation. Omer Jones' vacation leave request for March 25, 1977 was denied because of too short notice—one day. Jones' supervisor, however, had told him a week earlier that one day's notice was sufficient, and Jones' absence would not have disrupted the work schedule. Accordingly, we affirm the Board's conclusions that these denials violated subsections 8(a)(1) and (3) of the Act.

The Board also found that Procter & Gamble violated subsections 8(a) (1) and (3) when it twice suspended Omer Jones for attending negotiations on March 25 and July 18, 1977, without leave. Jones was president of the Kansas City union in 1977 and had worked at the plant for 44 years. He had a good attendance record and had never been disciplined. When Jones' request for vacation time on March 25 was denied, he nevertheless absented himself from work and participated in the Dallas bargaining session held that day. When Jones returned to work, his supervisor knew that he had been in Dallas. Jones was suspended for one day. Because it was futile to request a leave, Jones also absented himself from work on July 18, 1977, in order to attend a bargaining session at Baltimore. This time Jones' wife called the Kansas City plant on July 17 and reported that he would not be at work the

following day. In the past, Jones had taken time off after simply calling in beforehand. Jones also was absent from work on July 19 because his mother-in-law had an emergency operation. His absence on July 19 was excused, but Jones received a five-day disciplinary suspension because of his absence on July 18. Jones' supervisor testified that he was suspended because his excuse for July 18 was not "a good reason." (Jt. App. at 1772-73.) The Board found that Procter & Gamble disciplined Jones because he participated in the Dallas and Baltimore negotiations and because it sought to discourage the outsiders. The Board ordered Procter & Gamble to cease and desist from disciplining employees engaged in protected activities, to make Omer Jones whole for any loss of pay suffered because of his suspensions, and to expunge his personnel file.

Procter & Gamble contends that Jones' suspensions were justified because he twice absented himself from work without leave—acts of deliberate insubordination. Further, Jones' union activities do not immunize him from discipline. Procter & Gamble correctly asserts that mere union membership or concerted activity does not insulate an employee from being disciplined for just cause. *Florida Steel Corp. v NLRB*, 601 F.2d 125, 131-32 (4th Cir. 1979); *Firestone Tire & Rubber Co. v. NLRB*, 583 F.2d 1268, 1273 (4th Cir. 1978). Rather, as this court has stated on numerous occasions, when the employer has come forward with evidence of a legitimate and substantial business justification for disciplining an employee, the burden is on the Board not simply to declare the disciplinary action is pretextual because there is some evidence of improper motive, but to find "an affirmative and persuasive reason why the employer rejected the good cause and chose a bad one." *Firestone Tire & Rubber Co. v. NLRB*, 539 F.2d 1335, 1337 (4th Cir. 1976) (quoting *NLRB v. Billen Shoe Co.*, 397 F.2d 801, 803 (1st Cir. 1968)). *See also Florida Steel*, 601 F.2d at 131-32; *Firestone*, 583 F.2d at 1273; *NLRB v. Patrick Plaza Dodge, Inc.*, 522 F.2d 804, 807 (4th Cir. 1975); *NLRB v. Consolidated Diesel Electric Co.*, 469 F.2d 1016, 1024 (4th Cir. 1972). In carrying this burden, the Board must produce substantial evidence of antiunion motivation. *Florida Steel*, 601

F.2d at 132; *Firestone*, 583 F.2d at 1273; *Patrick Plaza Dodge*, 522 F.2d at 807; *Maphis Chapman Corp. v. NLRB*, 368 F.2d 298, 304-05 (4th Cir. 1966).

Applying these standards, we conclude that the Board properly found Procter & Gamble unlawfully suspended Jones in March and July 1977. Although Procter & Gamble introduced evidence of a just cause for its disciplinary actions—Jones' unapproved absences from work—the Board found antiunion motivation in Procter & Gamble's denying Jones leave in order to prevent him from participating in negotiations elsewhere; in suspending him without the usual "advisory talk" or warning despite his good record; in disciplining Jones when he was absent in order to attend a Baltimore bargaining session but not when he was absent because his mother-in-law was undergoing an operation; and in Procter & Gamble's overall hostility to the unions' attempt at coordinated bargaining. The question whether Jones was suspended because of Procter & Gamble's antiunion bias or because of his unexcused absences from work is a question of fact to be decided by the National Labor Relations Board, which is empowered by Congress to weigh the employer's interest "in operating his business in a particular manner" against the employees' interest in concerted activities. *NLRB v. Erie Resister Corp.*, 373 U.S. 221, 227-29, 236 (1963); *NLRB v. Lester Brothers, Inc.*, 337 F.2d 706, 708 (4th Cir. 1964). In this case, there is substantial evidence on the record as a whole to support the Board's finding that Procter & Gamble suspended Jones because of his union activities. Accordingly, we grant enforcement to these portions of the Board's order.

The Board found that at its Kansas City and Dallas plants, Procter & Gamble refused to sign single instruments embodying the agreed-upon contracts where such documents would contain the signatures of the respective union's entire bargaining committee in order not to recognize outsiders as members of those committees. The Board concluded these refusals violated subsections 8(a) (1) and (5) of the Act, 28 U.S.C. §158(a) (1), (5), and it ordered Procter & Gamble to cease and desist from such refusals to sign and ordered the

Kansas City management to sign the 1977 contract upon the union's request.

In Kansas City, the union officials and management could not agree upon a formal meeting to sign the contract immediately after the union membership ratified it on February 4, 1977. The plant manager, Robert McIntire, then refused to meet with the entire union bargaining committee. Instead, he gave the union president, Omer Jones, two copies of the contract with space for only their two signatures and stated that only Jones' signature was necessary to bind the union. Jones refused to sign and insisted that the union's entire committee was to execute the agreement. In the past, the parties had signed a single document with the bargaining committee, but not necessarily every member thereof, signing on behalf of the union. On February 9, Jones presented a contract to McIntire signed by the entire union team, including the outsiders, but McIntire refused to sign it. Rather, he signed yet another copy of the agreement and completely crossed out the union's signature line. McIntire enclosed this contract with a letter to Jones, stating that Procter & Gamble considered only Jones' signature to be necessary and, therefore, it was disregarding the other union signatures on Jones' February 9 copy. Further, it considered the two separately signed instruments together to complete the signing process and to produce a binding agreement. McIntire justified crossing out the union's signature line on the enclosed copy because he already had Jones' signature on the February 9 copy. (Jt. App. at 447.)[14] To date, the parties have never signed a single instrument although they agree that there is a valid contract in existence.

In Dallas, the union membership ratified the agreed-upon contract on April 7. The local management proposed that only union president, Roger Hatton, and plant manager, Niles Millsap, sign the contract. Hatton suggested, however, that the parties continue the past practice of signing one instrument with

[14] The Board also discredited McIntire's testimony that he would have signed a single instrument on February 4, even if it also contained the outsiders' signatures.

the plant manager signing for Procter & Gamble and the Union's negotiating committee signing for the union. Management then proposed either that the Dallas employees (but not the outsiders) and Millsap sign one contract or that two separately executed agreements be combined as in Kansas City. The union continued to insist upon a single executed instrument and a formal signing meeting. Millsap then sent Hatton a contract which he had signed with the space for all other signatures, including Hatton's, crossed out.[15] The cover letter stated that Procter & Gamble had satisfied its obligation to sign and only Hatton's signature was necessary on behalf of the union. Other signatures would be unacceptable. (Jt. App. at 661.) The parties again discussed signing the contract at the monthly meeting on May 5, 1977, but reached no agreement. On April 25, 1978, during the course of the unfair labor practices hearing, the new plant manager, Roy Gillespie, and sixteen of the eighteen union negotiators,[16] including the three outsiders, signed the contract. There was no formal meeting to execute the agreement; the union signed first and then presented the contract to Gillespie.

Subsection 8(d) of the Act, 29 U.S.C. § 158(d), requires "the execution of a written contract incorporating any agreement reached if requested by either party . . . ." The Supreme Court has noted that "refusal to sign a written contract has been a not infrequent means of frustrating the bargaining process through the refusal to recognize the labor organization as a party to it . . . ." *H.J. Heinz Co. v. NLRB*, 311 U.S. 514, 523-24 (1941). Thus, the Board is authorized under subsection 10(c) of the Act, 29 U.S.C. § 160(c), to order the employer, at the union's request, to sign the agreed-upon contract. *Id.* at 526; *NLRB v. Coletti Color Prints, Inc.*, 387 F.2d 298, 304 (2d Cir. 1967); *NLRB v. Hutting Sash and Door Co.*, 362 F.2d 217, 219 (4th Cir. 1966).

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[15] In addition to crossing out the space in order to prevent all the union negotiators from signing, Millsap placed the following notation on the contract: "The Union President was offered the opportunity to sign the Agreement and refused to sign." (Jt. App. at 702.)

[16] One of the negotiators was no longer a Procter & Gamble employee; the other declined to sign.

In this case, Procter & Gamble's refusals to sign the 1977 Kansas City and Dallas agreements—in sharp contrast to past practice—result solely from its opposition to the inclusion of outsiders on the unions' bargaining teams. At each plant, the plant manager insisted that only the union president's signature was necessary on behalf of the union and he crossed out the remaining space on the contracts in order to preclude additional signatures. Procter & Gamble contends that the unions, and not management, refused to sign the agreed-upon contracts, but the Board discredited that version. Since it is in a unique position to judge witnesses' credibility and because there is substantial evidence to support its determination that Procter & Gamble refused to sign the contracts, we will not upset these findings and conclusions on review. *Aerovox Corp.*, 435 F.2d at 1210; *NLRB v. M&B Headwear Co.*, 349 F.2d 170, 173 (4th Cir. 1965).

Procter & Gamble also argues that because both agreements have been signed, the issue is moot. In addressing this argument, we must distinguish between the cease and desist portion of the Board's order requiring Procter & Gamble not to refuse to sign an agreement because outsiders also will sign it and the affirmative portion of the Board's order requiring Procter & Gamble to sign the 1977 Kansas City contract upon that union's request. The cease and desist portion is entitled to enforcement as a continuing obligation in order to prevent resumption or repetition of the unlawful conduct. *NLRB v. Mexia Textile Mills, Inc.*, 339 U.S. 563, 567 (1950); *NLRB v. Metalab-Labcraft*, 367 F.2d 471, 472 (4th Cir. 1966). Because the 1977 Kansas City agreement by its own terms expired on February 3, 1980, however, we decline in this case to examine the validity of the Board's affirmative order to sign the contract. *NLRB v. Cosmopolitan Studios, Inc.*, 291 F.2d 110, 112 (2d Cir. 1961). Therefore, we grant enforcement only to the cease and desist portion of the order.

IV

The Board found one other unfair labor practice. It concluded that Procter & Gamble, at its Port Ivory plant, violated subsection 8(a)(1) of the Act, 28 U.S.C. § 158(a)(1),

when its soap and synthetic plant manager, Armin Sharfe, threatened employees that participation by outsiders in the negotiations would result in a less favorable contract than one negotiated by only local employees. The Board ordered Procter & Gamble to cease and desist from such threats.

The Port Ivory union vice president, Gordon Canney, testified that he spoke informally with Sharfe on several occasions during May through August 1976. Sharfe inquired about the union's plan to include outsiders on its bargaining committee and stated that Procter & Gamble would fight multiplant bargaining in every way. Canney also testified that he and Gordon Ritchie, a union executive committeeman, spoke with Sharfe in the plant cafeteria on or around September 8, 1976. Sharfe again expressed disapproval of multiplant bargaining, asked who the outsiders would be, and stated that the union would " 'not get a good contract by bringing people in from another plant because we [Procter & Gamble] are not going to show the rest of the plants that it's beneficial to belong to the Amalgamation.' " (Jt. App. at 1171.) Canney further testified that Sharfe said a contract with outsiders would be approximately five cents less per hour per employee.

Gordon Ritchie's testimony corroborated Canney's description of the September 8 discussion with Sharfe. Although Ritchie was not present for the entire meeting, he reported that Sharfe said outsiders "could cost us [the union] in money with the contract" (Jt. App. at 1196), and when Canney had then asked Sharfe to explain that statement, Sharfe replied, "well, it would cost you at least five cents a person per hour for the upcoming contract." (Jt. App. at 1197.)

Sharfe admitted voicing his opposition to both outsiders and multiplant bargaining to various union members, but he expressly denied making any alleged threats of a less favorable contract. Sharfe also denied meeting with Canney and Ritchie in September 1976. Rather, he testified that he discussed, with Ritchie only, the effect of outsiders on the upcoming negotiations, and in response to Ritchie's inquiry about the outsiders' financial impact, Sharfe speculated that the resulting contract might be five cents an hour less.

The Board first found that Sharfe did say a contract negotiated with outsiders would be worth about five cents an hour less for employees and that he also stated that the Port Ivory union would not get as good a contract because Procter & Gamble did not want to encourage employees at other plants to join the Amalgamation. The Board then looked to the context of Sharfe's remarks. Although he did not participate in the Port Ivory contract negotiations later held in October and November 1976, Sharfe was a Port Ivory plant manager, he had participated in the 1973 negotiations, and he was obviously well-informed about the 1976 bargaining atmosphere. High-ranking union officials, primarily responsible for the upcoming negotiations, would be likely to give special credence to Sharfe's comments. Therefore, the Board concluded that these comments were unlawful threats.

Procter & Gamble contends that Sharfe's comments are protected by subsection 8(c) of the Act[17] and the First Amendment. The Supreme Court has addressed the balance to be struck between an employer's free speech rights as protected by subsection 8(c) and employees' rights to associate freely as embodied in section 7, subsection 8(a)(1), and the proviso to subsection 8(c). In *Gissel Packing Co.*, 395 U.S. 575, the Court held that:

> [a]ny assessment of the precise scope of employer expression . . . must be made in the context of its labor relations setting . . . . And any balancing of those rights must take into account the economic dependence of the employees on their employers, and the necessary tendency of the former, because of that relationship, to pick up intended implications of the latter that might be more readily dismissed by a more disinterested ear.

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[17] Subsection 8(c), 29 U.S.C. § 158(c), provides:

The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.

Id. at 617. *See also NLRB v. McCormick Concrete Company of S.C., Inc.*, 371 F.2d 149, 152 (4th Cir. 1967). The Supreme Court also recognized "the Board's competence in the first instance to judge the impact of [employer] utterances . . . ." *Gissel*, 395 U.S. at 620; *accord, McCormick Concrete*, 371 F.2d at 152; *E.I. Du Pont de Nemours and Co. v. NLRB*, 480 F.2d 1245, 1247-48 (4th Cir. 1973). The question of whether an employer's comments are coercive is a factual one and the Board's findings shall be affirmed on review if supported by substantial evidence. *Du Pont*, 480 F.2d at 1247.

First, we uphold the Board's findings that Sharfe, in order to discourage multiplant bargaining, told the union officials that a contract negotiated with outsiders would be less favorable to Port Ivory employees than one negotiated with only local union members. There is substantial evidence to support these findings and because they go to the credibility of various witnesses, the findings are peculiarly within the province of the hearing officer and the Board and, therefore, entitled to acceptance on review. *NLRB v. Dover Corp., Norris Division*, 535 F.2d 1205, 1209 (10th Cir. 1976). Second, we hold that the Board properly analyzed both the effect of Sharfe's comments in toto and the probability that they would have a particularly chilling effect on the union officials in concluding they were unlawful threats. Considering the nature of Sharfe's remarks and the conditions under which they were made, the Board did not err in reaching its conclusions and we grant enforcement to its cease and desist order.[18]

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[18] Procter & Gamble also suggests that Sharfe's threats were not authorized and, therefore, it is not responsible for them. Under the National Labor Relations Act, employer responsibility for a supervisor's acts is not determined by strict rules of agency law. Subsection 2(13) of the Act, 29 U.S.C. § 152(13). Rather, the employer is responsible when "employees would have just cause to believe that [a supervisor] was acting for and on behalf of the company." *NLRB v. Texas Independent Oil Co.*, 232 F.2d 447, 450 (9th Cir. 1956). *Accord, Dover Corp.*, 535 F.2d at 1210 (10th Cir.); *Trey Packing, Inc. v. NLRB*, 405 F.2d 334, 338 (2d Cir. 1968); *NLRB v. Garland Corp.*, 396 F.2d 707, 709 (1st Cir. 1968). Considering Sharfe's position as a plant manager and his role in previous contract negotiations, the Port Ivory union officials would be justified in believing that he spoke for Procter & Gamble.

On appeal, Procter & Gamble argues that subsection 10(b) of the Act, 29 U.S.C. § 160 (b), bars the Board from considering either Omer Jones' March 1977 suspension or the Dallas management's refusals to make the plant premises available for bargaining and to pay local employees for the work time they lost while in negotiations. Subsection 10(b) provides in pertinent part that "no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board . . . ." Thus, if this proviso to subsection 10(b) is applicable, the Board lacks jurisdiction to adjudicate an unfair labor practice alleged in the untimely charge.

Kansas City union president, Omer Jones, received a one-day disciplinary suspension for attending the Dallas negotiations without leave. No unfair labor practice charge specifically challenged this conduct. The Kansas City union, however, had filed three unfair labor practice charges with the Board prior to Jones' suspension. Two of these charges had alleged that Procter & Gamble, in violation of subsections 8(a)(1) and (5) of the Act, had denied employees vacation leave or time off in order to prevent them from participating in the negotiations at Port Ivory and at other plants and had imposed discriminatory conditions on the union in retribution for its exercise of the right to select its bargaining representatives. The consolidated amended complaint of December 29, 1977 contained the necessary allegation as a subsection 8(a)(3) violation also. The Board found the earlier charges were sufficiently broad to encompass Jones' March suspension and, therefore, it considered this allegation on its merits.

Subsection 10(b)'s proviso, by its language, extinguishes liability for unfair labor practices committed more than six months prior to the filing of the charge. "It does not relate to conduct subsequent to the filing of the charge." *NLRB v. Fant Milling Co.*, 360 U.S. 301, 309 n.9 (1959). The Supreme Court has held that the Board may deal with subsequent conduct under a previous charge if the conduct is "related to" the unfair labor practices alleged in the charge and grows out of them while the proceeding is pending before the Board and if it is of

the "same class" of violations as those alleged in the charge. *Id.* at 307. *See also NLRB v. Jack La Lanne Management Corp.*, 539 F.2d 293, 295 (2d Cir. 1976); *NLRB v. Southern Materials Co.*, 447 F.2d 15, 18 (4th Cir. 1971); *NLRB v. Dinion Coil Co.*, 201 F.2d 484, 491 (2d Cir. 1952). Further, a charge does not serve the purpose of a pleading; its purpose is solely to set the Board's investigative machinery in motion. *Fant Milling*, 360 U.S. at 307. Thus, the Board has broad leeway to found a complaint on events not specified in the charge as long as it does not initiate the proceeding on its own, *NLRB v. I.U.O.E., Local 925*, 460 F.2d 589, 596 (5th Cir. 1972) (quoting *Texas Industries, Inc. v. NLRB*, 336 F.2d 128, 132 (5th Cir. 1964)), and unlike a charge, a complaint need not be filed and served within the six month period. *Dinion Coil*, 201 F.2d at 491.

After examining the record, we conclude that the Board properly found the earlier charges covered Jones' March 1977 suspension. The Board found Jones was denied vacation leave for March 25 in order to prevent him from attending the Dallas negotiations and he was disciplined because he attended those negotiations after absenting himself from work without leave. Such conduct clearly is related to the denial of vacation leave or time off to attend bargaining sessions at other plants. The practices complained of occurred within the same general time period and were part of the entire series of interrelated efforts by Procter & Gamble to discourage the unions' inclusion of outsiders on their bargaining teams. Finally earlier charges adequately informed Procter & Gamble that its leave denials had been challenged.[19]

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[19] Procter & Gamble also objects because the earlier charges did not specify an 8(a)(3) violation. This does not prevent Board consideration of the March suspension. What is crucial is that the complaint, not the charge, notify the employer of the charges against him, *I.U.O.E., Local 925*, 460 F.2d at 596, and even that need not be specific. *Owens-Corning Fiberglas Corp. v. NLRB*, 407 F.2d 1357, 1361 (4th Cir. 1969); *NLRB v. Pecheur Lozenge Co.*, 209 F.2d 393, 402 (2d Cir. 1953); *American Newspaper Publishers Ass'n v. NLRB*, 193 F.2d 782, 800 (7th Cir. 1951), *aff'd* 345 U.S. 100 (1953). In this case, however, the consolidated amended complaint did allege the March

(*footnote continues*)

Procter & Gamble also contends that subsection 10(b) bars consideration of the allegations of paragraph 15 of the Dallas consolidated amended complaint that Procter & Gamble refused to make the plant premises available for bargaining or to pay local employees for the work time they spent in negotiations from March 11 to April 6, 1977. The Dallas union filed four unfair labor practice charges with the Board, which did not specifically challenge these refusals, but did contain printed language that "[b]y the above and other acts, the above-named employer has interfered with, restrained, and coerced employees in the exercise of the rights guaranteed in Section 7 of the Act." (Jt. App. at 24-25, 29.)[20] The Board concluded that under the circumstances of this case, the catchall language of the charges legally encompassed the paragraph 15 allegations. In reaching this conclusion, it looked at the broad picture, focusing on an orchestrated effort by the four unions to include outsiders and a pattern whereby the management at each plant engaged in a substantially similar course of conduct in expressing its opposition to their inclusion.

Under *Fant Milling* and the other cases discussed above, the Board properly may issue complaints alleging other unfair labor practices not specified in the charge if "related to" or of the "same class" as the specified violations. At least one court has applied these principles in a similar case. In *NLRB v. Braswell Motor Freight Lines, Inc.*, 486 F.2d 743 (7th Cir.

(footnote continued)

suspension as a subsection 8(a)(3) violation and the Board, therefore, properly addressed this allegation on its merits.

Procter & Gamble also cites several cases for the proposition that events occurring after the original charge is filed and more than six months prior to the filing of an amended charge are barred by subsection 10(b). *NLRB v. Newton*, 214 F.2d 472, 474-75 (5th Cir. 1954); *Indiana Metal Products Corp. v. NLRB*, 202 F.2d 613, 618-19 (7th Cir. 1953). These cases are inapposite for two reasons. First, they deal with amended charges encompassing prior events; this case addresses including subsequent events within prior charges. Second, these cases were decided before *Fant Milling* and did not apply its test for determining the inclusion of subsequent events; to this extent, they are unpersuasive.

[20] A charge filed April 5, 1977, specifically covered the above conduct, but subsequently was withdrawn without prejudice and never reinstated.

1973), the charge alleged unfair labor practices at respondent's Chicago terminal. The amended complaint, however, also alleged violations at its Atlanta and Jackson terminals. The court found a sufficient nexus between the conduct at Chicago and the other terminals to avoid subsection 10(b)'s application, particularly because "the company's conduct at the three locations was part of an overall plan to resist organization by the [union]." *Id.* at 746. In this case, the Board found that Procter & Gamble engaged in a concerted course of conduct at all four plants in order to prevent the unions from including outsiders. The refusals to bargain at the plant or to pay employee negotiators were both part and parcel of the Dallas management's and Procter & Gamble's overall opposition. Moreover, the other unions had filed charges claiming that similar unlawful refusals at their plants were part of this coordinated opposition. Thus, the paragraph 15 allegations clearly are grounded in the viable charges, Procter & Gamble had ample notice of these charges against it, and, therefore, the Board properly considered the merits of these claims.

VI

The unions filed eleven viable unfair labor practice charges against Procter & Gamble which were transferred to the Board's regional office in Brooklyn, where complaints issued and the cases were consolidated pursuant to 29 C.F.R. § 102.33.[21] Procter & Gamble contends that the Board erred in never issuing one consolidated complaint covering all four plants and unions.

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[21] 29 C.F.R. § 102.33(a) (1980) provides in pertinent part that

> [w]henever the general counsel deems it necessary in order to effectuate the purposes of the act or to avoid unnecessary costs or delays, he may . . . order that [a] charge and any proceeding which may have been initiated with respect thereto:
>
> . . . .
>
> (3) Be transferred to and continued in any other region for the purpose of investigation or consolidation with any proceeding which may have been instituted in or transferred to such other region; . . . .

Consolidation is within the sound discretion of the Board, *Fruin-Colnon Corp. v. NLRB*, 571 F.2d 1017, 1020 n.3 (8th Cir. 1978); *NLRB v. UMW District 31*, 198 F.2d 389, 390 (4th Cir. 1952), and will not be disturbed where the parties are given a fair hearing, *Barrus Construction*, 483 F.2d at 195, and where no showing of prejudice is made. *UMW, District 31*, 198 F.2d at 390. In addition, any injury potentially caused by failure to issue a consolidated complaint is obviated when the employer has notice of the charges against him. An unfair labor practice complaint serves two purposes: "to present a clear and concise statement of the facts upon which jurisdiction by the Board is predicated and to indicate clearly and concisely the acts which are claimed to constitute unfair labor practices." *NLRB v. Sunnyland Packing Co.*, 557 F.2d 1157, 1161 (5th Cir. 1977). *See* 29 C.F.R. § 102.15 (1980). The complaint is not to be judged by rigid pleading rules; it is sufficient if the employer has notice of the basis of the charges against him, *Sunnyland*, 557 F.2d at 1161, and absent a special showing of detriment, the lack of specifics in the complaint is tolerated. *Owens-Corning Fiberglas Corp. v. NLRB*, 407 F.2d 1357, 1361 (4th Cir. 1969).

Procter & Gamble has not shown that it was prejudiced by consolidation or that it lacked notice of the charges against it. It did not move for separation of the cases and apparently contested transfer to Region 29 only in the case of the Dallas charges. Further, in its voluminous exceptions to the ALJ's decision and order, Procter & Gamble objects frequently to consolidation, but makes only a conclusory allegation of prejudice: because the ALJ issued one decision, he has attributed alleged unfair labor practices at one or two plants to all four plants. The record does not support this allegation. Although the ALJ issued one decision, he made separate findings of fact and conclusions of law for each plant and did not illogically mix the occurrences at the plants. *See NLRB v. Tex-O-Kan Flour Mills Co.*, 122 F.2d 433, 437 (5th Cir. 1941) (consolidation of charges made by separate unions at two separate mills was proper). Further General Counsel has prosecuted these cases on the theory of a concerted effort by Procter & Gamble to discourage the inclusion of outsiders on the union bargaining committees. By transferring the charges to Region 29, issuing

consolidated complaints for three plants, and consolidating all the cases for hearing, General Counsel gave Procter & Gamble indisputable notice of its theory of prosecution; Procter & Gamble has demonstrated no prejudice.

Finally, 29 C.F.R. § 102.33 does not require either a consolidated complaint or amendment of a complaint to reflect the issues as finally developed. While the regional director and the ALJ or Board, on motion, can amend a complaint "upon such terms as may be deemed just . . . ," 29 C.F.R. § 102.17 (1980), even failure to amend does not preclude finding an unfair labor practice where an issue is fully and fairly litigated. *Free-Flow Packaging Corp. v. NLRB*, 566 F.2d 1124, 1131 (9th Cir. 1978). Procter & Gamble certainly does not contend that it was unable to litigate any issue in these cases. Therefore, we find the Board did not abuse its discretion by failing to issue one consolidated complaint.

VII

Finally, Procter & Gamble raises several objections to the issuance of the order and notice to be posted at the four plants.[22] First, Procter & Gamble argues that a single, common notice and order requires all four plants to remedy unfair labor practices found at only one plant. For example, all four plants are now ordered to make Omer Jones, a Kansas City employee, whole for any loss of pay resulting from his suspensions. Obviously upon enforcement of the Board's order, the affirmative relief which Procter & Gamble must undertake will be carried out in individual plants. The Kansas City plant naturally will be the one to pay Omer Jones. Procter & Gamble's real complaint is that the Board has used specific acts

[22] Procter & Gamble contends that the notice requires it to meet and bargain collectively with union bargaining committees including outsiders even though the Board specifically found that Procter & Gamble did not refuse to bargain. Read in light of the accompanying order, Procter & Gamble must cease and desist from refusing to bargain with the unions by engaging in the unlawful conduct found by the Board in this case. Thus this contention is without merit.

occurring at one plant to bolster its findings of an unlawful four-plant scheme to defeat or discourage coordinated bargaining. This argument replicates Procter & Gamble's objections to nonconsolidation of the complaints and for the same reasons discusssd above, we find that it is meritless. Several courts, recognizing the Board's broad remedial powers, have upheld orders to post notices companywide even though the unlawful conduct was found to have occurred at only some company plants. *See, e.g., J.P. Stevens & Co. v. NLRB,* 612 F.2d 881, 882 (4th Cir. 1980); *United Aircraft Corp. v. NLRB,* 440 F.2d 85, 100 (2d Cir. 1971). The Board does not even go so far in this case since it limits the posting to the four plants involved. Accordingly, we find no error in the Board's order to post a common notice at all four plants.

Procter & Gamble also argues that the Board's order forces it to capitulate on three bargaining issues—making the plant premises available for negotiations, paying local employee negotiators, and granting employees uncompensated leave to participate in negotiations at another company plant—and such forced capitulation is beyond the Board's remedial power. *H.K. Porter Co. v. NLRB,* 397 U.S. 99 (1970); *NLRB v. American National Insurance Co.,* 343 U.S. 395 (1952). First, we note that the cease and desist portion of the Board's order only requires Procter & Gamble to stop refusing to make the plant premises available, to pay local employee negotiators, and to grant uncompensated leave *and/or vacation time* when it engages in such conduct because the unions' bargaining teams include outsiders. Even assuming this prohibition involves mandatory subjects of bargaining about which the Board may not order agreement, *H.K. Porter,* 397 U.S. 99, an issue which we need not decide, the prohibition simply does not impose new contractual provisions on the parties. Procter & Gamble may refuse to bargain on its plant premises for other valid business reasons, it does not have to pay local employee negotiators indefinitely, and it is free to develop the form of leave to be granted. We conclude that the Board's cease and desist order, which seeks to ensure that Procter & Gamble cannot interfere again with the unions' choice of bargaining representatives, is a proper exercise of its discretion in fashion-

ing remedies. *Gissel*, 395 U.S. at 612 n.32; *Fibreboard Paper Products*, 379 U.S. at 216.

Procter & Gamble also objects to part of the affirmative relief in the Board's order. Specifically, it objects to the Board's two additions to the ALJ's recommended order that Procter & Gamble (1) reimburse the unions for sums expended as rent for alternative meeting facilities in 1976-77 and (2) pay local employees for the work time they lost while in the 1976-77 negotiations.[23] Both modifications require only that Procter & Gamble correct the injuries suffered by the unions and employees during the 1976-77 negotiations. Absent Procter & Gamble's refusals to make its plant premises available for the 1976-77 negotiations or to pay the employee negotiators, neither the unions nor employees would have suffered the economic losses at issue here. Consequently, we hold that the Board's modified order is well within its discretion to remedy unfair labor practices.

Accordingly, except for that portion of the order requiring Procter & Gamble to sign the 1977 Kansas City agreement, we enforce the Board's order in full.

ENFORCEMENT GRANTED.

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[23] The General Counsel excepted to the ALJ's failure to award backpay for negotiators and Procter & Gamble briefed and argued this issue before the Board. Before this court, the Board now contends that because Procter & Gamble failed to file a petition for reconsideration of this affirmative relief with the Board, 29 C.F.R. § 102.48(d)(1), it cannot assert any objection absent extraordinary circumstances which are not present in this case. Subsection 10(e) of the Act, 29 U.S.C. § 160(e); *ILGWU v. Qualify Mfg. Co.*, 420 U.S. 276, 281 n.3 (1975); *NLRB v. Ochoa Fertilizer Corp.*, 368 U.S. 318, 322 (1961). Because this issue was briefed and argued to the Board, there is sufficient compliance with subsection 10(e). *NLRB v. Annapolis Emergency Hosp. Ass'n*, 561 F.2d 524, 527 (4th Cir. 1977). Accordingly, we will address this objection on the merits.

While the remedy of ordering Procter & Gamble to reimburse the unions for their share of the rental cost of alternative meeting facilities apparently was not fully litigated before the Board as such, both the General Counsel and Procter & Gamble litigated the ALJ's finding that Procter & Gamble violated the Act by refusing to make its plant premises available for bargaining. Accordingly, we also will address this modified remedy on its merits.

FIELD, Senior Circuit Judge, dissenting:

I would deny enforcement of the Board's order in this case. As the majority recognizes, four independent unions had for many years represented employees at four widely scattered plants of Procter and Gamble, and during those years certain negotiating procedures had been followed at each of these plants. In 1976 each of the four unions decided to include members of the other three unions on its bargaining committee which concededly was a step toward the unions' aim to bargain with Procter and Gamble on a multiplant basis. I had always been under the impression that when you start a new and different ballgame, as the unions did here, you do not continue to play under the rules of the old game. Yet that is exactly what the Board has ordered and the majority unfortunately has approved.

Procter and Gamble did not refuse to bargain with a committee containing "outsiders", but merely declined to continue its past practice of negotiating on plant premises and of paying local employee negotiators. The majority concedes that an employer has no duty to do either of these things, but finds that the discontinuance of such practices was retaliation for the unions' selection of "outsiders" on their committees. The company and the union negotiated with respect to the issue of the site of the bargaining sessions, and the parties agreed upon the site as well as the sharing of the costs of such facilities. Despite this fact the majority concludes that the company must not only make its premises available for future negotiations, but must reimburse the union for the rental cost which the union had agreed to pay incident to the 1976 bargaining sessions.

The Board's order forces Procter and Gamble to capitulate on three bargaining issues—make the plant premises available for negotiations, pay local employee negotiators, and grant employees uncompensated leave to participate in negotiations at another company plant. I agree with counsel for the employer that such forced capitulation is beyond the Board's remedial power and flies in the face of *H. K. Porter Co., Inc. v. National Labor Relations Board*, 397 U.S. 99 (1970), by compelling Procter and Gamble to agree to a proposal of the

union and requiring that it make concessions on bargainable issues. I am in accord with the observation of Judge Wood in *National Labor Relations Board v. Indiana and Michigan Electric Company*, 599 F.2d 185, 192 (1979) that "the union camel has been constantly circling the company tent probing for a way to stick its nose under, [and] [n]ow the Board itself has indirectly lifted the edge of the tent to make it easy". In my opinion the Board has no authority whatever to punish a company because it opposes a union, nor does it have the authority to force a company to facilitate the unions' efforts to attain their objectives.

UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD

THE PROCTER & GAMBLE MANUFACTURING COMPANY	
and	Cases 29—CA—5366 and 29—CA—5410
INDEPENDENT OIL & CHEMICAL WORKERS, INC.	
and	Cases 29—CA—5786, 29—CA—5787,
INDEPENDENT OIL & CHEMICAL WORKERS OF KANSAS CITY, KANSAS	29—CA—5789, and 29—CA—6030
and	Cases 29—CA—5785, 29—CA—5788, and
INDEPENDENT OIL & CHEMICAL WORKERS OF DALLAS	29—CA—5874
and	Cases 29—CA—5783 and 29—CA—6055
INDEPENDENT OIL & CHEMICAL WORKERS	

DECISION AND ORDER

On August 31, 1979, Administrative Law Judge Bernard Ness issued the attached Decision in this proceeding. Thereafter, the Respondent filed exceptions and supporting briefs, and the General Counsel filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and the briefs[1] and has decided to affirm the rulings, findings,[2] and conclusions of the Administrative Law Judge and to adopt his recommended Order, which is modified to reflect the amended remedy.

Amended Remedy

The Administrative Law Judge found, *inter alia*, that the Respondent violated Section 8(a)(1) and (5) of the Act by discontinuing its longstanding practices of making its premises available for contract negotiations and of paying plant employees who serve on the bargaining committee for worktime lost during negotiations in retaliation for the Unions' exercise of their right to select their bargaining representatives. To remedy these violations, the Administrative Law Judge recommended that the Respondent be ordered to cease and desist from refusing to allow bargaining in its plants and refusing to pay employees who are on the bargaining committees at their own plants for worktime spent on negotiations.

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[1] The Respondent has requested oral agrument. This request is hereby denied as the record, the exceptions, and the briefs adequately present the issues and the positions of the parties.

[2] The Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enf'd 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

For the reasons stated by the Administrative Law Judge, i.e., that deferral would "fragmentize the issues," Member Penello would not defer to the arbitration process the issues of granting leave to and paying negotiating committee members for time spent in negotiations. However, Member Penello reaffirms his adherence to the sound principles of *Colyer Insulated Wire, A Gulf and Western Systems Co.*, 192 NLRB 837 (1971). See his dissenting opinion in *General American Transportation Corporation*, 228 NLRB 808 (1977), and the majority opinion in *Roy Robinson, Inc. d/b/a Roy Robinson Chevrolet*, 228 NLRB 828 (1977).

Respondent's action in insisting that bargaining take place off of plant premises, and its refusal to pay employee-members of the Unions' bargaining committees for worktime spent in negotiations at their home plant represent unilateral departures from practices which had been maintained for decades, and have caused unnecessary expenditures for the Unions and a loss of pay to the employees in question. In order to fully remedy the violations referred to above, therefore, we shall order the Respondent to reimburse the Unions for money they expended for the rental of outside facilities for bargaining and to pay employees who were on their Union's bargaining team at their employing plant for worktime lost while negotiating.[3]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, The Procter & Gamble Manufacturing Company, Cincinnati, Ohio, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Insert the following as paragraphs 2(a) and (b) and reletter the subsequent paragraphs accordingly:

"(a) Reimburse the Unions for sums each expended for the use of off-plant facilities for bargaining during the 1976-1977 negotiations at Respondent's plants in Port Ivory, New York; Kansas City, Kansas; Dallas, Texas; and Baltimore, Maryland.

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[3] It is well established that the Board has broad discretion in fashioning remedies to undo the effects of unlawful conduct and to make employees whole for losses suffered as a result of unfair labor practices. See *N.L.R.B. v. Joseph J. Strong, d/b/a Strong Roofing and Insulating Co.*, 393 U.S. 357 (1969); *N.L.R.B. v. Florida Medical Center, Inc., d/b/a Lauderdale Lakes General Hospital*, 576 F.2d 666 (5th Cir. 1978); *N.L.R.B. v. Warehousemen's Union Local 17, International Longshoremen's & Warehousemen's Union [Los Angeles By-Products Co.]*, 451 F.2d 1240 (9th Cir. 1971).

"(b) Make employees of the four above-mentioned plants whole for any loss of pay which they may have suffered as a result of spending working time on bargaining for a new contract at their employing plant during the 1976-77 negotiations."

2. Substitute the attached notice for that of the Administrative Law Judge.

Dated, Washington, D.C. April 4, 1980

John H. Fanning, *Chairman*

John A. Penello, *Member*

John C. Truesdale *Member*

NATIONAL LABOR RELATIONS BOARD

APPENDIX
Notice to Employees

Posted by Order of the National Labor Relations Board
An Agency of the United States Government

WE WILL NOT refuse to meet and bargain collectively with each of the labor organizations named below as the collective-bargaining representative of the employees in the appropriate unit at our plant indicated, even where the bargaining committee of the Union includes persons not employed in the bargaining unit as described after the respective labor organization below:

(a) *Independent Oil & Chemical Workers, Inc.* All production and maintenance employees at the Port Ivory plants, including clericals, laboratory employees, and fire inspectors, but excluding confidential employees, professional employees, the nurse, guards, all managers and employees on leave of absence due to lack of work and supervisors as defined in the Act.

(b) *Independent Oil & Chemical Workers.* All employees employed at our Baltimore plant exclusive of the plant manager, supervisory employees, staff employees performing work of a confidential nature, and employees on a leave of absence due to lack of work.

(c) *Independent Oil & Chemical Workers of Kansas City, Kansas.* All employees employed at the Kansas City, Kansas, plant and Kansas City Warehouse, exclusive of the plant manager, all other members of supervision, the plant manager's secretary, general production manager's secretary, the personnel manager's secretary, the nurse, and employees on a leave of absence due to lack of work.

(d) *Independent Oil & Chemical Workers of Dallas.* All employees, including the Fire Marshal and the employees in any outside warehouse operated by the Dallas plant, excluding plant manager's secretary, operation manager's secretaries, industrial relations manager's secretary, the

cashier, other staff employees performing work of a confidential nature, professional employees, guards, watchmen, supervisors as defined in the LMRA, and employees on a leave of absence due to lack of work.

WE WILL NOT engage in conduct designed to unlawfully interfere with the selection of the bargaining committee even where the committee includes persons not employed in the appropriate unit.

WE WILL NOT discriminatorily deny uncompensated leave and/or vacation time to employees where the purpose of such leave is to attend and participate in contract negotiations as an invited representative of the Union which is the bargaining representative at another of our plants then engaging in negotiations for a collective-bargaining agreement.

WE WILL NOT refuse to sign an instrument embodying the terms and conditions of an agreed-upon collective-bargaining agreement because the instrument is to be or is signed by the members of the union negotiating committee regardless of whether they are employed in the appropriate unit.

WE WILL NOT suspend or otherwise discipline employees for engaging in protected concerted activity.

WE WILL NOT threaten that the employees would receive a less favorable contract if the union negotiating committee included persons not employed in the plant bargaining unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights under Section 7 of the Act.

WE WILL reimburse the labor organizations named above for sums each expended for the use of off-plant facilities for bargaining during the 1976-77 negotiations for contracts covering employees of our plants in Port Ivory, Kansas City, Dallas, and Baltimore.

WE WILL make employees of the above-named plants whole for any loss of pay they may have suffered as a result of spending working time on bargaining for a new contract at their employing plant during the 1976-77 negotiations.

WE WILL make whole Omer Jones for any loss of pay he may have suffered as a result of our discrimination practiced against him, with interest. WE WILL expunge from the personnel files the written data relating to such disciplinary action.

PROCTER & GAMBLE MANUFACTURING COMPANY

(Employer)

By _____

(Representative) *(Title)*

Dated _____

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 16 Court Street, Fourth Floor, Brooklyn, New York 11241, Telephone 212-330-7709.

UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD DIVISION OF JUDGES

THE PROCTER & GAMBLE MANUFACTURING COMPANY	
and	Case Nos. 29-CA-5366 29-CA-5410
INDEPENDENT OIL & CHEMICAL WORKERS INC.	
THE PROCTER & GAMBLE MANUFACTURING COMPANY	
and	Case Nos. 29-CA-5786 (formerly 17-CA-7367) 29-CA-5787
INDEPENDENT OIL & CHEMICAL WORKERS OF KANSAS CITY, KANSAS	(formerly 17-CA-7429) 29-CA-5789 (formerly 17-CA-7471) 29-CA-6030 (formerly 17-CA-7936)
THE PROCTER & GAMBLE MANUFACTURING COMPANY	
and	Case Nos. 29-CA-5785 (formerly 16-CA-6909)
INDEPENDENT OIL & CHEMICAL WORKERS OF DALLAS	29-CA-5788 (formerly 16-CA-7001) 29-CA-5874 (formerly 16-CA-7201)
THE PROCTER & GAMBLE MANUFACTURING COMPANY	
and	Case Nos. 29-CA-5783 (formerly 5-CA-8206)
INDEPENDENT OIL & CHEMICAL WORKERS	29-CA-6055 (formerly 5-CA-8748)

HOWARD EDELMAN, ESQ., for the General Counsel.

GUY FARMER and JOHN A. MCGUINN, ESQS. (FARMER, SHIBLEY, MCGUINN & FLOOD), Washington, D.C., for the Respondent's Port Ivory and Baltimore plants.

HAROLD S. FREEMAN and GREGORY L. HELLRUNG, ESQS. (DINSMORE, SHOHL, COATES & DEUPREE), Cincinnati, OH, for Respondent's Dallas plant.

HARRY L. BROWNE and JAMES G. BAKER, ESQS. (SPENCER, FANE, BRITT & BROWNE), Kansas City, MO, for Respondent's Kansas City plant.

ROBERT FOUSEK, ESQ., Kansas City, MO, for Independent Oil & Chemical Workers of Kansas City, KS.

G. WILLIAM BAAB, ESQ., Dallas, TX, for Independent Oil & Chemical Workers of Dallas.

SIDNEY BLUM, ESQ., Baltimore, MD, for Independent Oil & Chemical Workers.

DECISION

Statement of the Case

BERNARD NESS, Administrative Law Judge: These consolidated proceedings were held before me in Brooklyn, New York on the General Counsel's complaints, consolidated complaints and answers filed thereto. Hearing was held on 14 days during a period between April 17 through May 31, 1978. These proceedings involve four of the Respondent's plants located at Port Ivory, New York, Baltimore, Maryland, Kansas City, Kansas, and Dallas, Texas. In general, the issues litigated were whether the Respondent violated Sections 8(a)(1), (3), and (5) of the Act. The central issue stems from the attempts of each of the Unions involved to include members of the other unions as part of its negotiating team in connection with the 1976-1977 contract renewal negotiations. The General Counsel contends that the Respondent has erected unlawful roadblocks to the Unions' attempts and that these impediments are proscribed by the Act.

Upon the entire record,[1] including my observation of the witnesses and their demeanor, and after due considerations of the oral arguments and the exhaustive and helpful briefs filed by the General Counsel and the Respondent,[2] I hereby make the following:

Findings of Fact

I. Jurisdiction

The Respondent maintains its principal offices in Cincinnati, Ohio, with plants located in various states of the United States, including plants in Port Ivory, New York, Baltimore, Maryland, Kansas City, Kansas, and Dallas, Texas. The specific plants named are those involved in this proceeding. The parties agree, and I find, the Respondent meets the Board's jurisdictional standards and is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. The Labor Organizations Involved

The parties agree, and I find, the following are labor organizations within the meaning of Section 2(5) of the Act, and each is the bargaining representative for the employees in the plant indicated in parenthesis:

A. Independent Oil & Chemical Workers, Inc. (the Port Ivory Plant)

B. Independent Oil & Chemical Workers (the Baltimore Plant)

C. Independent Oil & Chemical Workers of Kansas City, Kansas (the Kansas City Plant)

D. Independent Oil & Chemical Workers of Dallas (the Dallas Plant)

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[1] An unopposed Motion by Respondent to correct the transcript was granted by my Order dated August 10, 1978.

[2] A reply brief filed by the Respondent has also been considered.

In this Decision, each of the Unions mentioned above will be referred to, where appropriate, merely as the Union, or as the Union with a parenthetical reference to the plant where it represents the employees, e.g., Union (Port Ivory).

III. The Unfair Labor Practices

A. *The Complaints*

Unfair labor practice charges initially were filed by the respective Unions in the Board's Regional Offices in Brooklyn, New York (Region 29), Baltimore, Maryland (Region 5), Kansas City, Kansas (Region 17), and Forth Worth, Texas (Region 16). Thereafter, the unfair labor practice charges were transferred to the Brooklyn Regional Office (Region 29) from where the complaints were issued. Below are listed each of the unfair labor practice charges, the dates filed, the dates of transfer to Region 29, the dates of the issuance of the complaints and of consolidation, where appropriate. The number appearing in parenthesis is that given to the charge upon transfer of the one appearing immediately above.

Case No.	Date of Filing or Transfer	Issuance Date
29-CA-5366	12/10/76	07/22/77 A*
29-CA-5410	01/17/77	07/22/77 A
5-CA-8206	10/6/76	
(29-CA-5783)	07/22/77	11/11/77 B
16-CA-6909	11/26/76	
(29-CA-5785)	07/22/77	11/09/77
		03/20/78 C
		(Amended Complaint)
17-CA-7367	11/03/76	
(29-CA-5786)	07/22/77	11/09/77
		12/29/77 D
		(Amended Complaint)
17-CA-7429	12/08/76	
(29-CA-5787)	07/22/77	11/09/77
		12/29/77 D
		(Amended Complaint)

* The letters A through E indicates the companion cases with which each was consolidated.

Case No.	Date of Filing or Transfer	Issuance Date
16-CA-7001	02/01/77	
(29-CA-5788)	07/22/77	11/09/77
		03/30/78 C
		(Amended Complaint)
17-CA-7471	01/24/77	
(29-CA-5789)	07/22/77	11/09/77
		12/29/77 D
		(Amended Complaint)
16-CA-7201	05/09/77	
(29-CA-5874)	08/31/77	11/09/77
		03/20/78 C
		(Amended Complaint)
17-CA-7936	10/25/77	
(29-CA-6030)	11/28/77	12/21/77
		12/29/77 D
		(Amended Complaint)
5-CA-8748	07/13/77	
(29-CA-6055)	12/01/77	12/15/77 E

B. *Background*

Each of the Unions involved is an independent labor organization and has been the bargaining representative for a number of years for the employees at the respective plant. There have been separate bargaining units. Each plant contract is made only with the Union at that particular plant. Each of the Unions is recognized as the bargaining agent only at its particular plant. The issues giving rise to this proceeding grew out of negotiations beginning at Port Ivory in 1976, until the Baltimore negotiations were completed in December 1977. The common thread in the four plants is that the Union in each plant, beginning with Port Ivory, planned and attempted to have employees from the other three plants, participate as members of the negotiating team at each location.

In 1968, a number of the independent unions representing employees at various of the Respondent's plants formed what was termed an Amalgamation—Independent Oil and Chemical Workers, herein called the Amalgamated. The charter members consisted of four unions. In 1971, there was a change in

the membership and it then consisted of the four unions involved in this proceeding. The record clearly established that an aim of the Amalgamation was and is to establish a multi-plant unit.[3] The Respondent admittedly is opposed to multi-plant bargaining. Membership in the Amalgamated is confined to unions representing Respondent's employees and its subsidiaries. It meets three times a year.

At an Amalgamated meeting held in Dallas in September 1975, the four unions decided that in the upcoming contract negotiations with the Respondent, each union would have a member from each of the other three unions as a member of its bargaining team. The proposed plan was published by the Union (Port Ivory) and distributed to its members in October 1975 (G.C. Exh. 4). It reads, *inter alia*, as follows:

> "each will participate in the bargaing (sic) at each of the four plants. The Amalgamation will bear the expense of the Amalgamated bargaining team. . . . By having the other plants of the Amalgamation participate in the bargaining we move closer to the purpose of the Amalgamation, to sit down and bargain our common contract."

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[3] The Amalgamated's Constitution (Resp. Ex. 39) provides, *inter alia*, as follows:

Article II, Purpose, Sec. 1. "To develop a spirit of cooperation and to promote mutual understanding between its members for the purpose of collective bargaining, and to aid in collective negotiations.

Article 9, Committees

* * *

Sec. 2 Bargaining Committee

* * *

B. Shall be duty of the Bargaining Committee to attempt to establish a multi-plant unit or units, and to conduct all negotiations with the employers and shall report their progress to the local organizations making all recommendations it deems necessary.

* * *

G. Pending the establishment of a multi-plant unit or units, as contemplated by the above sub-sections the bargaining committee shall be authorized to, upon request, delegate a bargaining representative or representatives to any of the participating local unions for the purpose of aiding or assisting in local negotiations.

Separate and apart from the Amalgamated, there also exists a council. The council consists of a group of nine independent unions representing employees at various of the Respondent's plants around the country. It meets once a year for the purpose of exchanging information of common interest. The four unions involved herein all belong to the council.

The contracts at the four plants had different expiration dates. In the past, contracts were negotiated at each plant between plant management and the Union bargaining committee composed of employees of the particular plant. Occasionally, the Union involved would have its attorney present. Negotiation sessions have been held at the plant and the Union bargaining committee employees were paid by the Respondent for the time spent in negotiations during working hours. At some point before or during the 1976-1977 negotiations, the Unions let it be known to their respective plant management that they intended to or may have "outsiders" present as members of the respective Union's negotiating team.[4] In each of the four plants the Respondent refused to permit outsiders to come into the plant for contract negotiations for reasons described later in this Decision. Thus, the 1976-1977 negotiations were conducted off the plant premises and the bargaining committee employees were not paid for the time spent in negotiations. Common in each of the complaints directed to the plants involved herein, the General Counsel has alleged the Respondent has refused to permit contract negotiations to be held on the plant premises and refused to pay its employees for time spent in bargaining, contrary to past practice, with an object of forcing the Union not to have outsiders on its negotiating team. The General Counsel also contends that the Respondent unlawfully denied Union and/or vacation leave to employees to attend contract negotiations at the other plants. Other unlawful conduct is also alleged pertaining to that particular plant. No contention is made of bad faith bargaining concerning substantive issues during the bargaining.

[4] "Outsiders" as referred to in this Decision is the term used by the parties and applies to employees of the Respondent's other plants sitting in on contract negotiations at another plant.

C. *The Port Ivory Plant*

The Port Ivory consolidated complaint alleges, in substance, as follows:

Paragraph 10. During June through September 1976, Respondent's Port Ivory plant manager, Armin Scharfe, unlawfully threatened employees.

Paragraph 11. Respondent in October and November 1976,[5] refused to permit contract negotiations to be held on its premises and refused to pay its employees for the time spent in bargaining during working hours with an object of forcing the Union not to have outsiders participate on its bargaining team.

Paragraph 12. On October 6, Respondent refused to continue to bargain if outsiders were present and participated on the Union's bargaining committee.

Paragraph 13. In September through November, Respondent denied Union leave and/or vacation leave to its employees at the Baltimore, Dallas and Kansas City plants while simultaneously refusing to permit the Port Ivory negotiations to be held outside of normal working hours, with an object of preventing said employees from participating in the Port Ivory negotiations.

Paragraph 14. During December and in January 1977, Respondent denied Union leave to its Port Ivory employees while simultaneously refusing to permit the Kansas City negotiations to be held outside of normal working hours, with an object of preventing said employees from participating in the Kansas City negotiations.

Paragraph 15. In December and in January 1977, Respondent's Port Ivory personnel manager, Robert Jones, unlawfully threatened employees.

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[5] All dates in this section of the Decision refer to 1976 unless otherwise indicated.

Since the 1930s, the Union (Port Ivory) has been the bargaining representative of the employees at the facility.[6] The most recent contract which preceded the 1976 negotiations ran from November 18, 1973, until November 18, 1976. The Port Ivory plant was the first of the four plants where negotiations began for a new contract.

The Negotiations and the Participation of Outsiders

Contract negotiations in the past had always been conducted in the plant during working hours and employees on the Union's negotiating committee had been paid for the work time lost in negotiations. The entire Union negotiating team was comprised of Port Ivory plant employees with the Union's attorney occasionally in attendance. Ken McCauley has been the Union president for the past 11 years. Philip Robinson has been the Port Ivory Division Manager and in overall charge of the Port Ivory plant. These two were the chief spokesmen for their respective parties in the 1976 negotiations. Robinson was assisted by Bob Jones, Port Ivory's personnel manager. Robinson worked directly under R. M. Womack, Manager of Manufacturing, Package Soap Division, located in Cincinnati. In labor relations matters, Robinson consulted with and received advice from Bob Larson, of the Respondent's industrial relations staff in Cincinnati. At least by the early part of 1976, Robinson was aware that the Union intended to bring in outsiders to serve on its negotiating committee and believed this was a ploy designed to move the collective bargaining process towards a multiplant bargaining relationship which it opposed. The Respondent's opposition to multiplant bargaining was well known to the Union. Before the negotiations began, Robinson consulted with Larsen concerning the Union's intentions to bring in outsiders. According to Robinson, Larsen advised him

[6] The bargaining unit, as agreed to by the parties and as described in the contract is as follows: All production and maintenance employees at the Port Ivory plants, including clericals, laboratory employees, and fire inspectors, but excluding confidential employees, professional employees, the nurse, guards, all managers and employees on leave of absence due to lack of work and supervisors as defined in the Act. There are about 1,000 employees in the bargaining unit.

the Union had a right to have outsiders on its negotiating team and since the Union would be changing the bargaining procedures by bringing in outsiders, the Respondent could also make changes in the ground rules for bargaining. Larsen also "reminded him of the plant security rule concerning visitors to the plant.[7]

Prior to the negotiations, Robinson attempted, without success, to induce the Union to bargain only with its Port Ivory employees on the Committee as in the past. The Union refused to name the outsiders who would participate on the Union's negotiation team. In the latter part of September, Robinson told the Union that if it insisted on having outsiders on its committee he would not permit negotiations to be held on the plant premises. He also stated the Respondent would not pay the employees for the working time lost during negotiation sessions. McCauley then said that since the Respondent would not permit the outsider members of its negotiating team in the plant, negotiations would then have to be held outside the plant. McCauley also proposed the parties meet on weekends and after working hours but Robinson refused. I am convinced, based on the entire record, had not the outsider issue surfaced negotiations would have proceeded, as in the past, in the plant with employees being paid for working time lost.[8]

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[7] The Respondent provided what is called a guided tour for visitors to the plant. This applied also to employees of Respondent's other plants. Its policy did not permit non Port Ivory employees to wander around the plant by themselves. In past negotiations, Union attorneys were permitted access in the plant.

[8] Although Robinson would have it appear that the Union proposed off-site negotiations and that he assented, it is clear the Union had no alternative lest it submitted to the exclusion of outsiders. When asked by the General Counsel if the Respondent would have permitted negotiations to be held in the plant as in the past had the Union announced only its attorney would be present rather than outsiders, he replied, "I don't know how it would have come out. We were in as I was describing it, a dynamic situation where we were trying to accomodate [sic] each other needs. . . . "I'm not sure where we would have ended up because we found an accomodation [sic] at least some other way." (Transcript pages 1317-1318.) As noted earlier, before negotiations began, Robinson had urged the Union to retain its negotiating team composed exclusively of Port Ivory employees and obviously wished to continue the bargaining procedures as in the past 30 years.

Negotiations began on October 6. After 14 sessions agreement was reached and a contract was signed by the parties on November 16. All the negotiation meetings were held in a motel, the parties sharing the cost. Employees were not paid for the working time lost. At the first session on Wednesday, October 6, three outsiders were present—Ray Bramble (Baltimore), Hoyt Middlebrook (Dallas) and Omer Jones (Kansas City).[9] McCauley had contacted officials of the three other Unions and asked them to have a representative attend. This was the only meeting in which outsiders participated. At the outset of the October 6 meeting, McCauley introduced the three non Port Ivory employees as members of the Union's negotiating team and said they were present to help negotiate a Port Ivory contract. Robinson then posed a series of prepared written questions to each of the three outsiders. He had received these prepared questions from Larsen. The questions concerned their role and purpose in participating on the Committee. He also asked how they were selected and by whom.[10] Some of the questions were not answered but Robinson was told they were there as members of the Port Ivory team to negotiate a contract for the Port Ivory team and that was their sole purpose. McCauley also told Robinson that the additions to the Union's committee were not limited to the three specific individuals in attendance. After Robinson's interrogation, he adjourned the meeting and told the Union he wanted time to study the ramifications of the presence of outsiders at the negotiations.[11] The next meeting was held on October 12—three working days later. Outsiders did not participate in any of the remaining negotiation sessions. McCauley testified he made a number of attempts, without success, to determine ahead of time when the next meeting would be so he could notify the other plants to have a representative present. Canney, a Union committeeman, also testified the Respondent would not agree to a meeting more

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[9] Bramble switched shifts with another employee in the Baltimore plant in order to attend. Middlebrook was on vacation at the time. Jones had been refused Union leave. He took a night flight and was able to attend without losing time from work. More about his tribulations, *infra*.

[10] General Counsel Ex. 11.

[11] Larsen had told Robinson to seek advice if the answers were not fully responsive.

than two days hence. The record does not support their contentions. Negotiation sessions were held on October 6, 12, 13, 18, 19, 25, 26, and on November 1, 3, 4, 9, 10, 11, and 16. By mutual consent, a number of meetings were held on the succeeding day. And at the October 19 meeting, Personnel Manager Jones suggested meeting next on October 25, six days later. The Union agreed. At the October 26 meeting, Robinson suggested meeting on November 1, six days later. The Union agreed. At the Monday, November 1 meeting, McCauley asked when the parties could again meet. Robinson stated he would not be available that Friday. The parties then agreed to meet Wednesday, November 3. At the November 4 meeting, McCauley suggested the parties next meet on November 9. The Respondent agreed.[12] Nonetheless, McCauley did communicate with the presidents of the other Unions in order to have a representative from their respective plants present in the Port Ivory negotiations at given negotiation meetings. They were unable to get leave.

Efforts of Outsiders to Attend the Port Ivory Negotiations

Baltimore

The Baltimore contract (1974-1977) provided for leave for Union business. Section 6, Article XVI reads as follows: "By agreement between the Plant Manager and the Union, leaves of absence without pay up to thirty (30) days per year may be granted for the purpose of attending to Union business." (G.C. Ex. 23.) The preamble refers to the "Union" as the contracting labor organization. This provision has been in preceding contracts since 1947. In past years, the practice had been for the Union to submit a written request for Union leave. The request identified the persons for whom the leave was requested, the period involved and it also included the statement, "for the purpose of attending to Union business." The form request did not describe the particular "Union business." Nor did the Baltimore plant management inquire as to the nature of the Union business. In past years, Union representatives were

[12] See transcripts of the negotiation sessions for those days. (Resp. Ex. 44, 46, 47 and 49.)

given Union leave to attend Amalgamation and Council meetings, to meet with government officials and to attend to its local Union affairs. But never before had leave been requested to attend negotiations for or on behalf of another labor organization. On September 27, Donnellon submitted a Union leave request on behalf of another Union official and himself to be off on October 5 and 6. (G.C. Ex. 25.) [13] On September 29, Personnel Manager Capshaw told Donnellon he must know the nature of the Union business for which the leave was requested. Donnellon refused to tell him. Capshaw then denied the leave and said he assumed the request for Union leave was to participate in the Port Ivory negotiations. On October 4, Plant Manager Graham told Donnellon his interpretation of the Union leave contractual provision did not call for granting leave to attend bargaining negotiations at another plant. On October 5, Donnellon applied for and was granted four hours Union leave for the afternoon of October 6. Donnellon was not asked the nature of the Union business.[14] On October 6, Donnellon filed the unfair labor practice charge in Case No. 5-CA-8206. As stated above, Raymond Bramble of the Baltimore plant attended the October 6 Port Ivory meeting but he was on his own time. Donnellon submitted additional requests for the purpose of attending the Port Ivory negotiation meetings subsequent to October 6. Each time the request was denied. The request had been made for a date when a Port Ivory meeting was scheduled. The record shows the leave was denied by the Baltimore management because of the belief the Union leave request was to attend Port Ivory negotiations. Plant Manager Graham informed Donnellon that Union leave would not be granted to attend negotiations at Port Ivory or any other plant. I have no doubt that Baltimore management was aware when the Port Ivory negotiations were taking place. As Graham stated, he knew of the October 6 meeting. A negotiation meeting was also scheduled for October 15 at Port Ivory. On October 8, Donnellon applied for Union leave for

[13] McCauley had requested his attendance at the initial Port Ivory negotiation meeting.

[14] Graham was aware that Port Ivory negotiations would take place on the morning of October 6. As he testified, he granted the four hours leave to Donnellon because he knew Donnellon could not have time to attend the Port Ivory negotiations that day. (Transcript page 1880.)

Wilkins and himself for October 15. The leave time requested was to attend the scheduled October 15 Port Ivory negotiation meeting. On the morning of October 13, although requested by Personnel Manager Capshaw, Donnellon refused to reveal the nature of the Union business. Capshaw then said he assumed it was to attend the Port Ivory negotiations and denied the requested leave. Donnellon then asked his immediate supervisor, Garmen for a one day vacation leave for October 15. Garmen said he would have to get back to him. Shortly thereafter, Garmen returned and denied the vacation request, stating that a new company policy required 10 days notice.[15] Later that afternoon, on October 13, Capshaw told Donnellon the October 15 Port Ivory negotiation meeting had been cancelled. Yet the Union at Port Ivory was not made aware of the cancellation until the afternoon of October 14. McCauley testified that at about 2:15 p.m. on October 14, Port Ivory's Personnel Manager Jones told him the scheduled October 15 meeting had to be cancelled because both Robinson and he had to be in Cincinnati on October 15. When McCauley called Donnellon the evening of October 14, to tell him of the cancellation, Donnellon already had heard of the cancellation from Capshaw. I find that Donnellon was denied the vacation request to prevent him from participating in the Port Ivory negotiations.

Kansas City

The Kansas City contract (1974-1977) contained the following provision pertaining to Union leave: "By agreement between the Union and the Plant Manager, leaves of absence without pay up to thirty (30) days a year may be granted for attending to Union business." (G.C. Ex. 15.) The language contained therein has been the same since the 1952 contract except for one minor change.[16] The preamble refers to the "Union" as the contracting labor organization.

At the same time of the events herein involved, Omer Jones had been president of the Union (Kansas City) for about

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[15] Donnellon credibly testified that in the past such notice was not required. He also testified that two other employees applied after him for a 1-day vacation leave for October 15 and those request were granted.

[16] Plant Manager substituted for Superintendent.

12 years. It had been the practice for Union leave requests to be made orally. Apart from stating the request was for Union business, the Union did not state the specific purpose nor did the plant management inquire. Like Baltimore, Union leave had been granted to attend periodic Amalgamation or Council meetings, to visit with the Union's attorney, or to take care of local Union affairs.[17] Jones also testified that on some occasions where he had been granted Union leave, he visited other plants and was present at a strike at the Baltimore plant in 1971. Further examination of Jones revealed that on those particular occasions, the Union leave was for the purpose of attending Amalgamation meetings in cities where one of the Respondent's plants was located. He took those occasions to visit the plant and arrangements were made with the plant manager to tour the plant. And with respect to the Baltimore visit, Jones' presence in Baltimore was also to attend a Council meeting and while there he talked to people on the picket line on Saturday. On no occasion prior to 1976, had the Union (Kansas City) ever requested Union leave to represent another Union in negotiations.

On about September 27, McCauley called Jones and asked him to arrange to come to the Port Ivory initial negotiation meeting to be held on either October 5 or 6. On September 28, Jones made his request to Plant Manager Robert McIntire for Union leave for October 5 and 6, first only for himself and if not available to him, then to two other named Union officials.[18] McIntire admittedly was aware that Port Ivory negotiations were beginning and that the Unions intended to participate in each others contract negotiations. Jones admitted to McIntire the purpose of the leave was to participate in the Port Ivory negotiations. McIntire then denied the request and stated the Union leave contract provision did not encompass situations to participate in negotiating for another labor organization. As described above, Jones managed to attend the October 6

[17] The Respondent normally was aware of the purpose of the request in such situations.

[18] At this time, Jones was on disability leave. Although he told McIntire the doctor had cleared him for return to work, McIntire responded that the time for his return to work was speculative and he would first have to return to work.

meeting at Port Ivory without taking any leave from work. On two later occasions, Jones asked Industrial Relations Manager Partin for Union leave which he intended to use to attend Port Ivory negotiations. Partin told him the leave was denied if it was for the purpose of attending the Port Ivory negotiations. Jones did not go.

The General Counsel also contends, Jones was denied vacation leave because he intended to participate in the Port Ivory negotiations.[19] The practice at the plant was that April 1, was the cutoff date for scheduling firm vacations for that year. If an employee posted his proposed vacation schedule prior to the cutoff date, his schedule was not subject to bumping by a senior employee who made a request after the cutoff date for a similar vacation period. Where two employees made a request after the cutoff date the senior employee could claim the date even though his request was made later. Jones testified that on October 14 or 15, he requested a one day vacation for October 18, and his supervisor, boiler house manager, Steve Blasche, rejected his request, stating that he just that morning had granted a junior employee, Al Dietzel, a vacation for that time. Blasche's testimony, which I credit, was that Jones did not request vacation time for October 18. He testified Jones requested four days—October 12 through October 15. He turned down Jones' request because Dietzel had been scheduled prior to the April cutoff date to be on vacation October 13-19 and thus could not be bumped by Jones.[20] Had both individuals applied after the cutoff date for the same vacation period, Jones would have been entitled to it as the senior employee even if requested later than Dietzel.

Dallas

The Dallas contract (1974-1977) contained the following provision relating to Union leave: "By agreement between the Union Executive Committee and the Plant Manager leaves of absence without pay up to thirty (30) days of a year may be

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[19] In his brief, the General Counsel mistakenly refers to October 6 as the date of the vacation day requested by Jones. Jones initially testified he requested October 6; later in his testimony, he changed it to October 1.

[20] See Resp. Ex. 103 and 105.

granted for attending to union business."[21] This same provision has been identical in contracts going back to at least 1954.[22] The preamble refers to the "Union" as the contracting labor organization.

For the past several years the requests for Union leave were made verbally to the Industrial Relations Manager. The information furnished to management included the names of the individuals for whom the leave was requested and the specific dates involved. The specific purpose was furnished, either voluntarily or upon request. Requests were denied if the specific purpose was not furnished.[23] A Union leave request was denied in 1975 and became the subject of a grievance ending in arbitration. The Union had requested Union leave to go to Alexandria, Louisiana, to explain its contract to the Alexandria union which represented the employees at the Respondent's plant there. The arbitrator's decision issued on January 5, 1978 unholding the Respondent's denial of the Union leave.[24]

Hatton had been asked by McCauley of the Port Ivory plant to attend the initial Port Ivory negotiations meeting. He requested Union leave for two other union officials, Osborne and Stephens and also himself for October 5 and 6. Bruce Paton, Industrial Relations Manager at the Dallas plant, asked Hatton the nature of the Union business. When Hatton refused to divulge the purpose, Paton said he would give Hatton an answer later. Thereafter, Paton again asked Hatton the nature of the Union business and asked if it was to attend the Port Ivory negotiations. Hatton refused to say. Paton then said that since he couldn't determine if the leave was for Union business, the leave request was denied.[25] Paton also told Hatton, together with Stephens and Osborne, they would be subject to disciplinary action if they took off and appeared at the Port Ivory

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[21] G.C. Exh. 21.

[22] Testimony of Roger Hatton, president of the Union (Dallas).

[23] In about September 1976, Union leave was denied to Hatton because he had not furnished a specific reason for the leave. He had intended using this leave to attend a negotiation seminar at Southern Methodist University. (Transcript pages 827-828.)

[24] Resp. Ex. 51. The arbitration hearing was held on October 5, 1977.

[25] Paton testified the request would have been denied had Hatton given attendance at Port Ivory as the reason.

negotiations. None of the three went to Port Ivory for the October 6 meeting.[26] Subsequent attempts were made by Hatton to obtain Union leave for October 15, October 28-29 and November 4-5. Each time the requests were denied when Hatton refused to give the reason. Paton testified he knew the Port Ivory plant was engaging in bargaining on the dates requested for Union leave.[27] Grievances have been filed regarding the denial of the Union leave and are pending arbitration.

When Hatton's request for Union leave was denied, he applied for vacation leave for the two days—October 5 and 6. Hatton was a pipefitter welder assigned to the hydrolizer. There were 10 employees in the department, grouped in different skills, under the supervision of Mechanical Manager, Don Lambeth. Newman was the other pipefitter welder assigned to the hydrolizer. The practice generally was for no more than two employees in the department to be off on vacation at any given time, although there were exceptions. Single vacation days were permitted. The grant of vacations was determined by seniority and the need for the particular skills of the mechanics involved. Of the ten mechanics on the crew for the week ending October 10, Rhea, a general mechanic, was out on disability. Hatton and Newman, possessing the same mechanical skills, both applied for October 5 and 6. A third employee, Evans, an instrument electrician, had requested October 5. Evans' request was granted, there being other instrument electricians on duty. The requests of Hatton and Newman were denied.[28] The General Counsel contends that the vacation time, as well as the Union leave, was denied to Hatton to keep him from attending the Port Ivory negotiations. Hatton testified it was Reeves, as well as Newman and he that had applied for the vacation time and Reeves was granted the leave. The record does not support his testimony. The Respondent's records show that Evans was on vacation on Tuesday, October 5 (Resp. Ex. 96) and Reeves was not on vacation at all that week. (Resp. Ex. 96 and 117.) I am

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[26] As mentioned above, Middlebrook, a member of the Union (Dallas) Executive Committee, was on vacation at the time and attended the Port Ivory meeting.

[27] Transcript page 1510.

[28] There is no contention Newman intended to go to Port Ivory.

satisfied with Lambeth's explanation as to why he denied the vacation time to Hatton as well as Newman. He credibly testified the hydrolizer was down the early part of the week. Hatton and Newman were the only two pipefitter welders in the hydrolizer and he needed their skills at that time on some other job. In short, I find Hatton was not denied vacation leave to prevent him from participating in the Port Ivory negotiations.

The Threats by Armin Sharfe

The complaint alleges that Plant Manager Sharfe threatened employees at various times during June through September.[29] Sharfe was the Port Ivory plant manager during the relevant period herein. In December 1977, he became the manager at the Baltimore plant. Sharfe had participated in the 1973 Port Ivory contract negotiations. He was not involved in the 1976 negotiations but was kept informed by Robinson and Jones.

Gordon Canney, the Union's vice-president, testified he had several discussions with Sharfe concerning the Amalgamation and the upcoming Port Ivory negotiations. Sometime in May or June and also in July, during informal discussions with Sharfe in the plant cafeteria, Sharfe asked who the outsiders would be and where they were coming from. Sharfe also said multiplant bargaining would not work and the Company "would fight it in every way."[30] Canney further testified another discussion about this subject took place in September, again in the cafeteria, with Gordon Ritchie present.[31] Once again, Sharfe voiced his disapproval of multiplant bargaining. Sharfe again asked who the outsiders would be.[32] According to Canney, Sharfe said the Union would not get a good contract if outsiders were brought in since it would indicate to the other plants the advantages of multiplant bargaining. Then when Canney said the Company should offer to the Union two contracts, one with and one without outsiders in negotiations,

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[29] The initial charge relating to the Port Ivory plant was filed on December 10, 1976. (Case No. 29-CA-5366.)

[30] On cross-examination, Canney said Sharfe added, "legally or otherwise." Canney said that was "closest" to what Sharfe said.

[31] Ritchie is a Union Executive Committeeman.

[32] Sharfe never was given the names.

Sharfe allegedly replied the Company did have the two prepared. When Canney asked what were the differences in the two contracts, Sharfe replied that the one prepared in the event outsiders were present would be about five cents an hour less for the employees.[33]

Ritchie testified that in a number of informal discussions, Sharfe expressed his opposition to the presence of outsiders in Port Ivory negotiations and multiplant bargaining. He testified that in the latter part of September, Sharfe told him if the Union persisted in the presence of outsiders, it would set the plant back 10 years. Ritchie testified on cross-examination that every time Sharfe and he discussed the presence of outsiders (about five times) Sharfe said "the same thing all the time. That we were bringing the outsiders and the Company would fight us with every means that they had."

Thomas Walsh, the Union's treasurer, testified he had many conversations with Sharfe concerning multiplant bargaining and the Union's intention to bring outsiders into the contract negotiations. He testified that in late August or September, he sat down next to Sharfe in the plant cafeteria to discuss informally a grievance. During the discussion, Sharfe voiced his disapproval of the Union's intention to bring in outsiders to the contract negotiations and that "the Company was going to use any means available to them to fight it." Sharfe also said that relations had been good in the plant and the Company had spent money to improve the plant. According to Walsh, Sharfe said if the Union persisted in moving towards coordinated bargaining the Union couldn't expect the Company to continue to spend money to improve the plant.

Sharfe testified he was opposed to the presence of outsiders in the upcoming contract negotiations because it would lead to multiplant bargaining and outsiders were not familiar with local plant problems. He admitted voicing such opposition to employees as far back as May. He also admitted inquiring as to the identity of outsiders and their purpose in attending negotiations. He expressly denied making any of the threats attributed

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[33] Ritchie substantially corroborated Canney's testimony above concerning this September meeting although he was not present during the entire discussion.

to him. He recalled having a conversation with Walsh in about late August on this subject. His version was that he pointed out the Company had made a substantial investment in modernizing the plant and the relationship in the past several years, as compared to earlier periods, was a healthy one. He also mentioned he could not see why the Union would now want to change the bargaining procedure by bringing in outsiders.[34] He expressly denied indicating the Company would discontinue making future investments in the plant if the Union persisted in bringing in outsiders. He also recalled a conversation with Ritchie in September where they expressed their views as to multiplant bargaining. He admitted there was a discussion about five cents an hour but his version differs from that of Ritchie and Canney.[35] He testified Ritchie asked him why he was so concerned about outsiders participating and why their presence should have any effect on the negotiations or the contract itself. It was at that point he spoke of the good relationship between the parties during the last several years. Ritchie then inquired what the financial effect would be in either case—a good or a bad relationship. He replied it would be about five cents an hour but he was speculating. He denied saying anything about the Company having two contracts. He admitted telling Ritchie bargaining would be more fruitful if no outsiders were present and the parties bargained as in the past. In connection with making any statements about the Company's intention to fight multiplant bargaining his version was that he told employees on a number of occasions, "The Company would use every legal and moral means at is disposal to oppose amalgamation."[36]

Considering the probabilities of the situation as it existed at the plant before bargaining began, and after considering the entire record, including my observation of the witnesses, I find that Sharfe, on a number of occasions, expressed his opposition to the presence of outsiders in the Port Ivory negotiations and multiplant bargaining and inquired as to the identity of the

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[34] He testified he made similar statements to Canney and Ritchie.

[35] He testified this was a discussion with Ritchie alone and Canney was not present. He denied having a conversation with Canney and Ritchie on about September 9, as testified to by Canney and Ritchie.

[36] Transcript page 1705.

outsiders and what their role would be in bargaining. He harped on the advantages of maintaining the *status quo* and of the stable relations between the Union and the Respondent in the most recent years and predicted the results of bargaining would not be as fruitful for the Union with the participation of outsiders.[37] I am convinced he said, in substance, a contract finally negotiated with the presence of outsiders in bargaining would be worth about five cents an hour less for employees than if the parties negotiated as in the past with the Union Committee consisting only of plant employees.[38] He also stated the Union would not get as good a contract with the participation of outsiders in the negotiations because the Company would be concerned that employees at the other plants would find it beneficial to belong to the Amalgamation leading to multiplant bargaining. These were informal discussions between Union officials and Sharfe. It could be argued that such comments may have been speculative remarks since Sharfe would not be engaged in the actual bargaining. Perhaps had these remarks been made by a departmental foreman, such argument would be more cogent. However, Sharfe was the Port Ivory plant manager and had himself engaged in the 1973 negotiations. Such statements as mentioned above connote clear and convincing threats that the participation of outsiders in the Port Ivory negotiations would result in a less favorable contract I find such conduct constituted unlawful threats violative of Section 8(a)(1) of the Act. When Sharfe referred to the Company's opposition to multiplant bargaining, I find he said the Company would fight it "in every way." I do not find such remark reasonably could be construed to mean the Company would use unlawful means. Also, when referring to the Respondent's investment in modernizing the plant, I view Sharfe's remarks as having reference to the stable bargaining relationship that existed at the time and was in the context of convincing the employees to continue the existing bargaining procedures, rather than a threat to discontinue improvements at the plant.

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[37] Although I have not detailed the credibility of each of the witnesses, I have taken into account the probabilities of the subjective interpretation by the witnesses of Sharfe's remarks to the employees.

[38] I do not believe Sharfe said the Company had prepared two contracts.

The Denial of Union Leave to the Port Ivory Employees and the Threat By Personnel Manager Jones

The General Counsel has alleged in the Complaint that in December and in January 1977, Respondent, at Port Ivory, denied Union leave to the Port Ivory employees to attend negotiations at the Kansas City plant while simultaneously the Respondent, at the Kansas City plant, refused to permit Kansas City negotiations to be held outside of normal hours.[39] The Complaint further alleges that in this same period, Port Ivory Personnel Manager, Robert Jones, threatened the Port Ivory employees in December and in January 1977, with termination and other reprisals if the employees attended the Kansas City negotiations. The Kansas City negotiations will be discussed later in this Decision.

The 1973-1976 Port Ivory contract relating to Union leave reads as follows: "By agreement between the Union and the Division Manager leaves of absence without pay may be granted for attending to Union business." (Article XIII), (G.C. Ex. 2). The preamble defines the "Union" as the contracting labor organization. This same provision has been in previous contracts between the parties for at least 30 years.

The practice regarding Union leave had been for the Union to submit a printed form listing the employees involved and the dates requested for the leave. The request did not state the specific Union business. Prior to December 1976, the Respondent did not ask the reason for the Union leave. In most instances, it was aware of the purpose when requested. In the latter part of December, the Union put in a request for Union leave for several employees to be off on dates ranging from January 4 to 7. Personnel Manager Jones asked Canney if any of the leave requested was to go to Kansas City to "aid them in bargaining, to help them in bargaining."[40] Canney replied that it was except for the last three named for January 7, which was for leave to meet with labor organizations represent-

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[39] The complaint does not allege the Port Ivory employees were denied vacation leave. Such allegation is made in the Kansas City complaint.

[40] Testimony of Canney (Transcript page 646).

ing employees at Colgate and Lever Brothers.[41] The leave for the last three was granted but the leave to attend the Kansas City negotiations was denied. Jones told Canney if any of them showed up in the Kansas City negotiations, "there will be serious repercussions." Further requests for Union leave made in January 1977, to participate in the Kansas City negotiations were denied by the Respondent. Jones told the Union representatives on several occasions if they used Union leave to attend the Kansas City negotiations they would be subject to disciplinary action. The Union thereafter, did not request Union leave to attend the Dallas or Baltimore negotiations. Requests for Union leave for other purposes were granted except for manpower requirements. Prior to the initial request to participate in the Kansas City negotiations, no Union leave had been requested, granted or used to go to another of Respondent's plants or to another company and participate on behalf of another labor organization in the bargaining at such plant or company. The Union's requests to go to Kansas City were, at the invitation of the Union (Kansas City), to participate as members of the Union's (Kansas City) bargaining committee in the negotiations there for a new contract. It was the Respondent's position that the Port Ivory contract did not mandate the use of Union leave for such purpose.[42]

D. *The Kansas City Plant*

The Union (Kansas City) has been the bargaining representative of the Kansas City employees for more than 40 years.[43] The most recent contract which preceded the negotia-

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[41] Granting of leave to meet with the Colgate and Lever Brothers unions was always treated by the Respondent as Union business since the Port Ivory employees were meeting on behalf of the Union (Port Ivory). Such meetings were not with the employers.

[42] I do not agree with Respondent's contention this issue be deferred to the arbitration process for reasons described in the Dallas section of this Decision.

[43] The bargaining unit, as agreed to by the parties, is described as follows: All employees employed at the Kansas City, Kansas plant and Kansas City Warehouse, exclusive of the plant manager, all other members of supervision, trainees for supervision, the plant manager's secretary, general production manager's secretary, the personnel manager's secretary, the nurse and employees on a leave of absence due to lack of work. There are approximately 475 employees in the bargaining unit.

tions involved herein ran from August 3, 1974 to February 3, 1977. Contract negotiations had always taken place in the plant and the members of the Union's bargaining committee, all employed at the Kansas City plant, were paid by the Respondent for the lost work time spent in negotiations. On some occasions in past years, the Union's attorney was present during the contract negotiations in the plant. Omer Jones, employed at the Kansas City plant for more than 44 years, was president of the Union during the relevant period herein.[44] Robert McIntire, plant manager for the past 6 years, was the principal spokesman for the Respondent during the latest contract negotiations, assisted by Industrial Relations Manager Marvin Partin.

The unfair labor practice allegations of the Consolidated Complaint relating to the Kansas City plant (G.C. Ex.1bbb) described in substance below, will be considered *seriatim.*

Paragraph 11. In October and November, 1976, Respondent denied Union leave to its Kansas City employees to attend Port Ivory negotiations while simultaneously refusing to permit the Port Ivory negotiations to be held outside of normal business hours, with an object of preventing said employees from participating in the Port Ivory negotiations.

The above allegation has been discussed in the section of this Decision above relating to the Port Ivory plant and need not be repeated here.

Paragraph 12. During October through December 1976 and January 1977, Respondent refused to permit contract negotiations to be held on its premises and refused to pay its employees for the time spent in bargaining during working hours with an object of forcing the Union not to have outsiders participate on its bargaining team.

In July 1976, the Union served notice to reopen the contract due to expire on February 3, 1977. McIntire replied it was premature to begin formal negotiations and suggested it commence about 60 days before the expiration date, as in the

[44] He had been the Union president for 12 years, although not consecutively and also held other Union offices during his period of employment.

past. Jones' letter to McIntire of October 26, suggested a meeting to discuss ground rules, including frequency of meetings and personnel who would participate in the bargaining. Then began an exchange of letters and meetings between the parties. McIntire wanted to exchange contract proposals and discuss substantive contract terms whereas Jones said he first wanted a resolution of the problem of the composition of the Union's bargaining committee. They discussed the ground rules. Jones indicated the Union intended to have outsiders on the Union bargaining committee and referred to the problems of outsiders being present at the Port Ivory negotiations. McIntire said he wanted to check out the legality of the Union's intentions to add outsiders to its committee. At meetings held on December 2 and 3, McIntire acknowledged that the Union had the right to select its own bargaining committee representatives. He stated that since the Union was insistent upon having outsiders on its bargaining committee, the Respondent's position was that bargaining would be outside the plant, the employees would not receive pay for work time lost in negotiations, and the Union should share the cost of the meeting place facilities and of the transcript. Then followed an exchange of correspondence. The Union reluctantly agreed to meet off the premises because of the Respondent's refusal to permit outsiders into the plant for negotiations. Jones also protested to the other changes announced by McIntire, i.e., non payment to employees for lost working time spent in negotiations and sharing the cost for the meeting room and transcript. McIntire testified that he felt for some time it would be more advisable for negotiations to be held on neutral ground. When the Union changed the bargaining procedure by its insistence on the participation of outsiders, it was for this reason as well as its plant security policy concerning the admission to the plant of individuals not working in the plant that he wanted the negotiations away from the plant.[48] With respect to non payment to the employees on the Union's bargaining team,

[48] Kansas City employees are issued identity cards and are permitted in the plant only when scheduled to work, except when specifically approved by the Industrial Relations Manager. Non Kansas City plant employees are permitted in the plant only on guided tours. On occasions in the past, the Union attorney participated in the negotiations in the plant.

McIntire testified he found that in the past this tended to drag out the negotiations and he had the opportunity to introduce this change when the Union opened the door with its announcement of outsiders. McIntire testified that he would have opted for bargaining off the plant premises even had the Union not insisted upon having the outsiders present. His testimony follows:

> Q. It is your position, Mr. McIntire, that had the Union proposed bargaining with Kansas City people, but with the addition of an attorney rather than the outsiders, this is their proposal, is it your position that you would have then said, well, the Kansas City attorney is an outsider and I can't let him in the plant, therefore, we'll have to bargain outside the plant?
> A. Okay. It is speculative and I don't know what I would have done, but my reaction to your question is I would have requested that we bargain outside the plant premises. (Transcript page 1844.)
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> Q. I'm not sure I recall your testimony that if the Union wanted to bring their attorney in rather than people from other plants—
> A. I said I would opt for off the premises.
>
> Q. You still would?
> A. Yes. (Transcript page 1862.)

However, in a letter to the Union on December 14, (G.C. Ex. 45) McIntire stated, *inter alia*, as follows:

> "... as we have repeatedly told you, *the Company was prepared to bargain a new agreement in the plant under the same conditions as in the past.* (Underscoring supplied.) However, you have changed the past conditions by insisting on having P & G employees from other plants present, even though you are fully aware that P & G employees who are not assigned to work at the Kansas City plant are permitted only on the visitor's tour. Thereupon, as a solution to this dilemma, the Company pointed out that the obvious alternative was to hold the bargain-

> ing sessions outside the plant and proposed that the Union share the cost of the facilities. Secondly, because of rising costs involved in this bargaining and previous bargaining, the Company proposed that the Union share the cost of the transcript and that there be no pay from the Company for time lost by the Bargaining Committee regardless of where the meetings are held."

In an earlier letter to the Union, dated November 24, McIntire stated, *inter alia*, "As I have told you in our discussions, I am prepared to negotiate in the same manner as we have in the past .... If you are still unwilling to proceed with bargaining on the same basis as we have in the past, we apparently will have to devote out meeting time on December 2, to discussing procedures rather than bargaining." (G.C. Ex. 40b.)

I am convinced that had the Union not raised the outsider issue, the Respondent was prepared to and would have engaged in the bargaining process as it had for the past 40 years with no change.

In the past negotiations were held during regular working hours. After several exchanges of letters, the parties at the request of the Union met on Sunday, January 9. Thereafter, all the meetings were held on weekdays during working hours at a local motel and employees on the bargaining committee were not paid for time spent in negotiations.[46] The Union requested negotiations be held on weekends but the Respondent was not amendable. At the January 18 meeting, Jones suggested they also meet on the weekend. McIntire refused. (G.C. Ex. 59, pages 143-153.) His refusal was affirmed in a Company notice to employees posted on the bulletin board. He explained there were adequate numbers of workdays left before expiration of the contract. (G.C. Ex. 60.) Thereafter, the Union renewed its request for weekend meetings. The Company repeatedly refused. (G.C. Ex 61-66.) At this first negotiation session on January 9, three outsiders were present—McCauley (Port Ivory), Wilkins (Baltimore) and Hatton (Dallas).[47] Jones

[46] The subsequent meetings were held on January 18, 31 and February 1 and 2.

[47] No outsiders participated in the later sessions.

introduced the three outsiders and said they were there at the request of the Union (Kansas City) to serve as members of its bargaining committee and to assist in negotiating a contract for the Kansas City plant. Then, as in the initial Port Ivory negotiations, McIntire posed a similar series of prepared questions to the outsiders concerning their selection and function. As in Port Ivory, after the question and answer period, the Respondent took a 30 minute recess.[48] The questions had been supplied to McIntire by the Industrial Relations staff at Respondent's headquarters in Cincinnati.

Paragraph 13. During December 1976 and January 1977, Respondent denied Union leave and/or vacation leave to the employees at the Dallas, Baltimore and Port Ivory plants while simultaneously refusing to permit the Kansas City negotiations to be held outside of normal working hours, with an object of preventing said employees from participating in the Kansas City negotiations.

It is undisputed the managerial personnel at Baltimore, Dallas and Port Ivory denied Union leave to their employees where the purpose was to attend the Kansas City negotiations. Reliance was placed in each instance on the Respondent's interpretation of the Union leave provision of the respective contracts heretofore discussed in the Port Ivory section of this Decision. No evidence was presented to show employees attempted to or the Respondent denied vacation leave to attend Kansas City negotiation.

Paragraph 15. On February 7, 1977, Respondent conditioned the execution of an agreed upon collective bargaining contract upon the signature of the Union president's signature being the only signature to appear on the contract on behalf of the Union.

In past years, the parties signed, a single instrument—this was the collective bargaining contract. On behalf of the Union, the Bargaining Committee members signed the instrument, but not necessarily each and every member.[49] On February 2, 1977, the parties agreed to the terms and conditions of a new

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[48] See G.C. Ex. 53.

[49] See the 1974 contract (G.C. Ex. 15 and Transcript pages 596-597).

contract. The Union advised the Company a ratification meeting of the membership would be held on Friday, February 4. McIntire said he would be available to sign the contract that evening, following the ratification. The parties could not agree to meet that Friday evening. McIntire told Jones that Partin had a later engagement that evening so the Company's time to execute the agreement was limited. Jones said the time period was not adequate. On Sunday afternoon, McIntire called Jones after having learned from Partin that Jones was pressing for a Monday meeting to sign the contract. Jones told him he had the outsiders available to sign the contract and asked for the Monday meeting. McIntire said he had been ill but he would be in the plant that Monday morning. He indicated he would not meet with the entire Union group. On Monday morning, February 7, McIntire was at the plant and offered two copies of the agreed upon contract with only signatures for Jones and McIntire. Jones refused to sign the contract and said that the Committee members must also sign the contract.[50] McIntire said only Jones' signature was required. On February 9, Jones presented his prepared contract to McIntire and asked McIntire to sign. This copy contained the signatures of the Bargaining Committee, including those of Hatton, McCauley and Bramble. (G.C. Ex. 16A.) McIntire refused to sign it and the copy was left with him. On February 18, Jones was given a letter from McIntire, together with an attachment—a copy of the contract containing McIntire's signature. Alongside it was a space only for Jones' signature and this had been crossed out by McIntire. (G.C. Ex. 16B.) In his letter, McIntire stated that Jones' signature alone was required and since the signatures of the Committee members on the copy given to him by Jones were unnecessary, he would disregard them. McIntire also stated that with the attached copy containing his own signature, attached to his letter, that completed the signing process. (G.C. Ex. 72.) Since that date neither party has signed the other party's signed instrument although there is no contention that a valid collective-bargaining agreement does not exist.[51]

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[50] Waiting in the wings at a local motel at Jones' request were Hatton (Dallas), McCauley (Port Ivory) and Bramble (Baltimore).

[51] I discredit McIntire's testimony that he would have signed a single instrument on Friday, February 4, even if it contained the signatures of the outsiders.

Paragraph 18, 19 and 20. On March 24, 1977, Respondent denied vacation leave to Omer Jones to prevent his participation in the Dallas negotiations scheduled for March 25 and thereafter, on March 28, suspended Jones for one day because he attended the March 25, Dallas negotiations.[52]

Jones is a boiler room engineer at the Kansas City plant where he has worked for 44 years. He was president of the Union (Kansas City). He was alerted during the week of March 14 by Hatton of the Union (Dallas) that a negotiation meeting at the Dallas plant would probably be held sometime during the week of March 21. On about March 18, Jones asked Steve Blasche, the boiler room foreman, an admitted supervisor, if he could get a day off on vacation with only one day's notice. Blasche replied he could if he were on the day shift and a relief man was available. On Wednesday evening, March 23, Hatton notified Jones a negotiation meeting was scheduled for Friday, March 25 and requested Jones' attendance.[53] On March 24, Jones asked Blasche for the vacation day for March 25. He

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[52] The Respondent contends this allegation is time barred by Section 10(b) of the Act. Three unfair labor practice charges were filed prior to March 1977, in the Board's Kansas City regional office relating to the Kansas City plant. (17-CA-7367, 7429, and 7471.) A fourth charge was filed on October 25, 1977, 7 months after the March 1977, incident. (17-CA-7936.) The first three charges alleged violations of Section 8(a)(1) and (5). In substance, these three charges alleged imposition of discriminatory conditions on the Union and its bargaining committee, refusals to grant leaves of absence and vacations and focused on the attendance at other plant negotiations. The initial consolidated complaint based on these three charges issued on November 9, 1977 and made no reference to the March incident. The fourth charge, filed on October 25, 1977, alleged Jones was discriminated against since July 18, 1977, and referred to his attendance at the Baltimore negotiations in July 1977. The Consolidated Amended Complaint covering the four unfair labor practice charges, which issued on December 29, 1977, included the March 1977 incident. Jones' March suspension was not investigated by the General Counsel until more than 6 months had elapsed. (Transcript page 911.) In agreement with the General Counsel, I believe the earlier charges are sufficiently broad to encompass the subsequent event, i.e., the Jones' suspension in March 1977. Even though they did not allege a Section 8(a)(3) violation, they did charge the Respondent with unlawfully refusing to grant leaves of absence and vacations to prevent attendance at other plant negotiations. Accordingly, this allegation will be considered on the merits.

[53] This meeting was scheduled on March 23, by the Dallas parties.

did not say it was for the purpose of attending the Dallas negotiations but such was indeed his intention. Blasche replied he had to check the work schedule. Jones told Blasche there was a work schedule in the immediate vicinity he could look at but Blasche ignored this and left. There was another identical work schedule posted in another room. Blasche returned about one and a half hours later and told Jones the vacation request was denied. Jones nevertheless, absented himself from work on March 25 without notifying the Company and attended the Dallas negotiations. Upon his return to work on his next scheduled work day, March 28, Blasche asked him why he was absent on March 25. At first, Jones said he was at work on that day. When Blasche said his timecard was not punched and he was not seen at the plant, Jones asked Blasche if he knew where Jones had been. Blasche replied he knew Jones had been to Dallas. Jones then admitted he had been in Dallas and had purposely said he was at work because he wanted to get an admission from Blasche that the Dallas and Kansas City plants had been in contact with each other concerning the negotiations.[54] Jones then was suspended for one day, March 29, and an entry was made in his personnel file of the disciplinary action taken. Jones credibly testified that on a number of occasions in the past he had taken a one day vacation with only one day's notice. Blasche testified he initially had told Jones he would probably approve a one day vacation request on one day's notice. He further testified that after Jones had requested to be off on March 25, he then recalled a Company policy which was instituted in 1975 and repeated again in 1976 which instructed employees to schedule their vacations early in the year and to keep to a minimum short notice vacation requests.[55] He also testified he denied Jones' request because of the short notice—he liked to be notified of the vacation request the week before so that the work schedule could be prepared. But he also admitted that insofar as Jones' request made on March 24, it would not have interfered with the scheduling of work.

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[54] The above is based upon Jones' credited testimony. I do not credit Blasche's denial that the Dallas negotiations was mentioned.

[55] Page 1748 of the transcript.

I am convinced Blasche's denial of Jones' request for a one day vacation for March 25 was not because of the short notice given. I believe that after Jones requested the day off, Blasche learned that a negotiation meeting was scheduled in Dallas for that day and the request was denied because the Respondent wanted to keep Jones, an outsider, from participating in the Dallas negotiations. I am convinced that had Jones' request been for a reason other than to be at Port Ivory, it would have been granted. Blasche knew that Jones had earlier participated in the Port Ivory negotiations and was aware that Dallas was in contract negotiations at this time.

Paragraphs 23 and 24. On July 20, 1977, Respondent suspended Omer Jones for 5 days because he attended the Baltimore negotiations on July 18, 1977.

A contract negotiation meeting at the Baltimore plant was scheduled to be held on Monday, July 18, off the Company premises. On July 15 or 16, Donnellon, president of the Union (Baltimore) telephoned Jones and asked him to attend the Baltimore meeting. Jones did not apply for Union leave in advance, having been denied Union leave in the past to attend the Port Ivory negotiations. Nor did he apply for vacation leave because he had been denied such leave in order to attend the Dallas negotiations. Jones was scheduled to report for work at midnight on Sunday, July 17. He did not report for work. Instead, he attended the Baltimore negotiations on July 18. His wife called the plant on Sunday afternoon and reported that he would be absent from work. Jones also failed to report for work on July 19 because, upon his return from the Baltimore negotiations, he had to take his mother-in-law for an emergency operation. Upon his return to work, Blasche asked him why he wasn't at work on July 18. Jones asked if Blasche knew where he had been. Blasche replied he did. Blasche already knew Jones had attended the July 18 Baltimore negotiation meeting.[56] Blasche then asked Jones why he had been absent on July 19. Jones told him of the family emergency. Jones' absence on July 19 was excused, the determination being made that the reason for the absence was justified. However, he

[56] Page 1777-1778 of the transcript.

received a 5-day suspension for his absence on July 18. Blasche explained that this was an unexcused absence and the reason later given, i.e., to participate in the Baltimore negotiation did not provide a justifiable reason for being absent. Since this was Jones' second offense, he received the 5-day suspension. Blasche testified it was his practice when employees were out on an unauthorized absence, he would question the employees upon their return to work as to the reason for the absence. He testified there was no prior instance while he was the boiler house supervisor that an employee did not have a justifiable reason for being absent without prior approval, e.g., illness or family emergency.[57] On the other hand, Jones, who had worked in this plant for 44 years, credibly testified that in the past he had taken time off after having called in beforehand, that he wouldn't be in that day and hadn't been asked the reason for the absence. He had never received a reprimand or suspension. He made the observation that he had a good attendance record and this may have been a reason in the past that he hadn't been asked the reason for his absence.[58]

I have no doubt that had Jones been absent for a reason other than to go to the Baltimore negotiations, he would not have received the disciplinary suspension, particularly since his wife had called beforehand. The Respondent does not contend it was unable to get a relief man—only that the reason for the absence was not "a good reason." (Transcript page 1779.)

The *Collyer-Dubo* Motion

Respondent's counsel[59] argues that the issues of the denial of Union leave and vacations, the disciplinary action imposed upon Jones and the refusal to pay the Union negotiators be deferred to the arbitration process. I find deferral of these matters would be inappropriate for the reasons expressed below in my discussion of the Dallas plant where similar arguments were made.

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[57] Blasche had been boiler room supervisor since June 1975.

[58] Blasche testified Jones' attendance record was good and no entries for disciplinary reasons had been entered in his record.

[59] Referring to counsel representing the Kansas City plant.

E. *The Dallas Plant*

The Union (Dallas) has been the bargaining representative of the Dallas employees since 1953.[60] There are approximately 500 employees in the bargaining unit. The most recent contract which preceded the negotiations involved herein ran from April 8, 1974 to April 8, 1977. In the past, contract negotiations had always been conducted on the plant premises and the members of the Union's negotiating team, all employees of the Dallas plant, were paid by the Respondent for the lost working time spent in negotiations. On occasions in the past, the Union's attorney attended the negotiations. The Respondent also paid for the preparation of the minutes of the bargaining sessions. Roger Hatton, was president of the Union for the past 4 years. The plant manager was Niles Millsap[61] and Bruce Paton was the personnel manager.

The unfair labor practice allegations in the consolidated amended complaint relating to the Dallas plant, (G.C. Ex. 1 iii) described in substance below, will be considered seriatim.

Paragraph 11(a), (b), (c) and (d). In September and October 1976, the Respondent denied Union leave and/or vacation leave and cancelled vacation leave previous granted to Dallas employees while simultaneously the Respondent refused to permit the Port Ivory negotiations to be held outside normal working hours, with an object of preventing Dallas employees from attending the Port Ivory negotiations where the Union (Port Ivory) had requested such assistance.

The above allegations have been discussed in the section of this Decision above, relating to the Port Ivory plant and need not be repeated here. The procedural defenses will be discussed later in this Decision.

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[60] The bargaining unit is described as follows: All employees, including the Fire Marshal and the employees in any outside warehouse operated by the Dallas plant, excluding Plant Manager's secretary, Operations Manager's secretaries, Industrial Relations Manager's secretary, the Cashier, other staff employees performing work of a confidential nature, professional employees, guards, watchmen, supervisors as defined in the LMRA and employees in a leave of absence due to lack of work.

[61] He was replaced by Roy Gillespie on February 1, 1978.

Paragraph 13(a), (b), (c) and (d). The Respondent in January 1977, denied Union leave to Dallas employees while simultaneously refusing the Kansas City plant negotiations to be held outside normal working hours with an object of preventing Dallas employees from attending the Kansas City negotiations where the Union (Kansas City) had requested such assistance.

These allegations have been covered in the section of the Decision relating to the Port Ivory and Kansas City plants. The procedural defenses will be discussed later in this Decision.

Paragraph 14. In September and October 1976, Respondent's Industrial Relations Manager, Bruce Paton, threatened Dallas employees with disciplinary action if they attended the Port Ivory negotiations.

These allegations too, have been covered in the section of this Decision relating to the Port Ivory plant. I have found Paton told the Dallas employees they would be subject to disciplinary action if they took off and attended the Port Ivory negotiations. He was referring to the use of Union leave for this purpose. The procedural defense will be discussed later in this Decision.

Paragraph 15(a) and (b). During January through April 1977, Respondent refused to permit bargaining sessions to be held on its premises, refused to pay its employees for work time lost in bargaining, refused to schedule negotiation sessions with 24 hours notice, and refused to meet with the Union's full bargaining committee. The Respondent engaged in such conduct to prevent outsiders from being on the Union's bargaining committee and because the Union wanted the assistance of the outsiders on its bargaining team.

The Respondent had been aware that in the forthcoming negotiations the Union intended to add to its bargaining team employees from the Baltimore, Kansas City and Port Ivory plants. In the past, the Union's bargaining committee consisted of 15 Dallas employees, including the Union officers. At the January 1977 monthly meeting, the Union notified the Re-

spondent of its desire to negotiate a new contract. Hatton also requested of Plant Manager Millsap that one or two preliminary meetings be held to establish ground rules. Millsap did not respond.[62] By letter dated March 7 to Hatton, Millsap proposed an initial negotiation meeting to be held on the morning of March 10 in the plant and attached contract proposals. In his letter, Millsap mentioned a proposed change would be the elimination of payment to bargaining committee members for time lost while bargaining but said that at least for the March 10 meeting, the employees would be paid. (G.C. Ex. 86.) A meeting was held on March 11.[63] No outsiders were present. Hatton told Millsap and Paton the Union would call in others—non Dallas employees—to be on the Union's bargaining committee. Millsap remarked this was a change in negotiating procedure and while it was the Union's business who would be on its committee, he had the right to know who they were. Hatton said he would provide the names before the meeting if a date would be set for negotiations. Millsap replied the Company policy prohibited outsiders except on a visitor's tour. He stated, if the Union had outsiders participating, he would arrange meetings off the plant premises, otherwise they could continue meeting in the plant. He also said if the Union intended to change the procedure for bargaining, the Respondent reserved the rights to make changes including nonpayment of wages of the committee members for time lost. He asked the Union to submit its ground rule proposals in writing, including the make-up of its committee and then the Respondent would suggest a date for negotiations. Hatton agreed to furnish the names and said the committee would include employees from other plants.[64] By letter dated March 14, from Hatton to Millsap, the Union furnished the names of the Dallas employees who were on its bargaining committee. The letter also stated the Company need only concern itself with the identity of the Dallas employees on the committee for the purpose of releasing them from work for attendance at negotiation meet-

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[62] Transcript page 762. Millsap did not testify. Personnel Manager Paton was not present at this January meeting.

[63] At the Union's request the meeting was put off from March 10 to March 11. (G.C. Ex. 87, page 53.)

[64] See minutes of March 11 meeting. (G.C. Ex. 87.)

ings. Hatton suggested a meeting on March 16, and again on March 18 and said the Union would need at least one day's notice prior to the meeting. (G.C. Ex. 88.) A meeting was held in the plant the morning of March 16. No outsiders were present. The committee members were again paid for the working time lost. Initially, Hatton said he wanted to discuss the ground rules because the Company had said it would not permit outsiders into the plant. He said if the Company still was of this view, the parties would have to meet elsewhere. Millsap requested they continue the same procedures as in past bargaining. Hatton said he was ready to meet the next day, nights or weekends and then proposed a meeting at the Union hall in the late afternoon and that any of the Committee members who lost time would be paid. Millsap said he would consider Hatton's proposal and notify the Union.[65] Later that day on March 16, Hatton was given a letter from Millsap. (G.C. Ex. 91.) In his letter, Millsap said his preference was to meet in the plant on March 17. He then stated, "However, in view of your insistence that we meet outside the plant and your continued refusal to engage in meaningful bargaining about our offer unless we meet outside the plant, I am willing in the interest of moving negotiations along to offer the alternative of meeting at a neutral site." This appears to be a deliberate distortion of the Union's position which was to continue negotiations as in the past, i.e., in the plant with the only change being the inclusion of outsiders. It was only after the Respondent insisted on not permitting outsiders into the plant that the Union then said the negotiations would then be off the premises. In his letter, Millsap proposed to meet at a local motel on March 17, at 1:30 p.m. rather than 4:30 p.m. as the Union had proposed, since there should be no trouble in completing negotiations during normal working hours. He also proposed that unless otherwise agreed, the bargaining committee members would not be paid for time lost while bargaining and the time lost would be considered Union leave of absence. He also proposed the parties share the cost of the motel facilities and continue to share the cost of the court reporter. On March 17, Hatton notified Millsap he did not agree with Millsap's proposals except for the situs and sug-

[65] See minutes of meeting (G.C. Ex. 89.)

gested meeting on March 18, at 8 a.m. and was prepared to meet again on Saturday and Sunday, March 19 and 20. (G.C. Ex. 92.) Millsap replied the same day, that the Respondent was willing to meet on Friday, March 18, but at 1 p.m., rather than 8 a.m. provided the conditions it outlined earlier were agreed upon by the Union. He refused to meet on Saturday or Sunday and stated there should be no trouble completing negotiations during normal working hours. (G.C. Ex. 93.) On March 18, Hatton said he disagreed with Millsap's proposed changes. (G.C. Ex. 94.) After further communications, the parties met again on Friday, March 25, at a motel. Also present on behalf of the Union were Donnellon (Baltimore), Omer Jones (Kansas City) and Sal Deanovich (Port Ivory). With these three, there were 18 on the Union's bargaining committee. At Millsap's request, Hatton identified the three outsiders and stated they were there to assist in negotiating a contract for the Union (Dallas). Then, as in the initial Port Ivory and Kansas City negotiations when outsiders appeared, Paton posed a similar series of prepared questions to the outsiders concerning their selection and function.[66] The parties then discussed the Union's substantive contract proposals. Millsap then suggested a further meeting on Monday morning, March 28. Hatton countered the Union was prepared to meet on Saturday or Sunday. Millsap said he wanted more time to consider the proposals and they agreed to meet at 9:30 a.m., Monday, March 28. At the March 28 meeting, no outsiders were present. Before a discussion on substantive contract proposals took place, Hatton suggested a further meeting for the next day, March 29, at 10 a.m. Paton suggested waiting to see what progress was made at the meeting. At the end of the meeting, Hatton suggested the next meeting be held on Wednesday morning, March 30, at 9:30 a.m. Millsap replied he would get back to him the following day. The parties again met at 9:30 a.m. on March 31. No outsiders were present at the beginning of the meeting but after a morning recess, Omer Jones (Kansas City) was present. After a discussion on substantive proposals, the Respondent said it wanted to consider the proposals and said it would get back to the Union to set up another meeting.

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[66] See G.C. Ex. 98. The questions had been prepared by Lambert of the Respondent's Industrial Relations Division in Cincinnati. (Transcript page 1538.)

The next meeting was held at 8 a.m., April 6.[67] No outsiders were present. The parties agreed to a contract subject to ratification by the Union membership. The contract was ratified by the membership on April 7.

Paragraph 16(a), (b) and (c). During January through April 1977, Respondent denied Union and/or vacation leave to its employees at Baltimore, Kansas City and Port Ivory, while refusing to permit Dallas negotiations to be held outside of normal working hours, with an object of preventing employees from Respondent's other plants from attending the Dallas negotiations.

With respect to the Port Ivory plant, McCauley testified they did not apply for leave to attend the Dallas negotiations because of Personnel Manager Jones' earlier threats of disciplinary action if the employees used Union leave to attend the Kansas City negotiations.

As for the Kansas City plant, the issse has been described in the section of this Decision relating to the Kansas City plant. I have found that Jones was denied a one day vacation for March 25, to prevent him from attending the Dallas negotiation meeting.

With respect to the Baltimore plant, there is no evidence the employees applied for leave to attend the Dallas negotiations. Donnellon had been told by Plant Manager Graham in January 1977, the Union would not be granted Union leave to attend the Kansas City or Dallas negotiations. Donnellon took a vacation day on March 25, to attend the Dallas negotiations. He was not asked the reason for his vacation request.

Paragraph 18. On or about April 7, 1977, Respondent refused to execute an agreed upon collective bargaining contract if the Union chose to have its full bargaining committee as signatories to such agreement.

Since at least 1954, a single instrument was signed by both parties after they agreed to the terms of a collective bargaining contract. The plant manager signed on behalf of the Respond-

[67] The contract was due to expire at midnight, April 7 and a strike action had been authorized.

ent. The members of the Union's negotiating committee signed the same instrument on behalf of the Union.

As stated above, the parties agreed to the terms of a contract on April 6 and the ratification by the membership took place on Thursday, April 7. On the afternoon of April 7, prior to the ratification, Paton approached Hatton regarding arrangements to sign the contract. He told Hatton he would be on vacation the following week and wanted everything wrapped up before he left. Paton said Millsap would wait around at the plant until after the ratification vote that afternoon and then Hatton could come to Millsap's office where both Hatton and Millsap could sign the contract. Hatton responded it should be done as in the past at a meeting where the plant manager and the Committee would sign the contract. Paton then suggested two alternatives: (1) the Dallas employees on the bargaining committee and Millsap sign the same instrument the following week, or (2) the contract be signed in the same manner as in Kansas City, i.e., one instrument to be signed by the Union's entire committee and another identical instrument to be signed by the plant manager.[68] Paton told Hatton he could pick up copies of the contract at his office later that afternoon. Hatton did pick up the copies. The testimony of Hatton and Paton is conflicting as to whether Hatton agreed to accept the Kansas City alternative and as to the appearance of the signature page on the contract given to Hatton.[69] I believe the copies presented to Hatton showed that the space for Millsap's signature was xxxd out. I credit Hatton's testimony that when he came to pick up the copies, Paton was in the process of xxxing out the space for Millsap's signature and said "he didn't want all the signatures to get on the same page.[70] Paton testified that in this conversation with Hatton on April 7, Hatton rejected Paton's other suggested methods of executing the contract but Hatton did agree to the Kansas City method. Hatton's version was that there was no complete understanding the Union would accept the Kansas City method. In any event, it became clear by April

[68] Paton was aware of the contract signing in Kansas City.

[69] Respondent Ex. 94.

[70] This comports with Respondent's steadfast opposition to the signatures of the entire Union committee, including the outsiders from appearing on the same instrument as the signature of the plant manager.

13, the Union wanted a single instrument executed by the Company and the Union's bargaining committee as in the past. On that date, Millsap asked Hatton when the Union would sign the contract. Hatton replied the Union was prepared to sign anytime Millsap met with the Committee. Millsap said that was not possible and laughed and walked away.[71] On April 18, Paton, who had returned from vacation, asked Hatton when the Union would sign the contract. Hatton replied, he was waiting for a meeting to be set up.[72] On April 21, Paton presented Hatton with a letter from Millsap with the contract attached. (G.C. Ex. 109.) Millsap's signature appeared on the signature page, dated April 11. Completely around Millsap's signature appeared typewritten xxxs to prevent any other signatures. The xxxs also covered Hatton's typewritten name and date of signing, April 7. Above and to the right of Millsap's signature was the typewritten notation: "The Union President was offered the opportunity to sign the Agreement and refused to sign." In Millsap's letter, he stated at the close, "Rather than delay further, I have attached a copy of the new Agreement, which I have signed. In so doing, the Company has fully satisfied its obligations. Only your signature as Union president is required to fulfill the Union's obligation to sign what has been agreed to and put into effect. Therefore, in view of the legal implications of your refusal to sign and other actions, I strongly suggest that you should come to my office by April 25, and give me your signature. Other signatures are unnecessary and are unacceptable." Hatton did not comply. At a May 5 monthly meeting, the parties again discussed signing of the contract. Millsap said he already signed the contract and that it was now up to the Union to sign their copy. Hatton said he wanted to follow the past practice of signing the same instrument.

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[71] Based on Hatton's testimony (Transcript page 790). Millsap did not testify.

[72] Hatton testified Paton told him it was not possible to have a signing meeting where Millsap and the entire committee would sign the same instrument. Paton's version was that his response was such meeting was not necessary and that he wasn't interested in such proposal. In any event, at the May 5 monthly meeting, Paton stated he had *rejected* the Union's proposed method. (See minutes of the May 5 meeting—Resp. Ex. 95.)

During the course of the instant hearing, on April 25, 1978, a single instrument was executed by the parties. Plant Manager Roy Gillespie, who had succeeded Millsap, signed on behalf of the Respondent. Sixteen of the 18 members of the Union's negotiating committee signed on behalf of the Union. One of the 18 members of the Committee was no longer employed by the Respondent at the time of execution and one other declined to sign. The 16 who signed included Jones (Kansas City), Deanovich (Port Ivory), and Donnellon (Baltimore). There were no formal signing meeting. The contract was first signed by the Union and then presented to Gillespie who then signed it.

The Procedural Defenses

The Respondent's counsel[73] contends the allegations in Paragraph 11 of the Consolidated Amended Complaint dealing with the denial and cancellation of vacation and the allegations contained in Paragraphs 14 and 15 are time-barred by Section 10(b) of the Act because they are beyond the scope of the charges upon which the Consolidated Amended Complaint are predicated. (G.C. Ex. 1 iii.)

None of the three charges filed in the Board's Dallas regional office specifically refers to the denial or cancellation of vacation leave.[74] The first two do charge the Respondent with the denial of Union leave. The third charge refers to the refusal to sign the agreed upon contract. None refers to supervisory threats or to the allegations contained in Paragraph 15 of the Consolidated Amended Complaint. Each however, contains the catch-all phrase, "By the above and other acts—." It should be noted, however, one of the unfair labor practice charges filed in the Board's Brooklyn, New York regional office, as well as the Consolidated Complaint issued thereon, did charge the Respondent with denying and cancelling vacatation leave to Dallas employees, as well as Kansas City and Baltimore

[73] Referring to counsel representing the Dallas plant.

[74] Case Nos. 16-CA-6909 (29-CA-5785) filed November 26, 1976; 16-CA-7001 (29-CA-5788) filed February 1, 1977; 16-CA-7201 (29-CA-5874) filed May 9, 1977.

employees, to prevent them from assisting in the Port Ivory negotiations.[75] The Union (Dallas) had also filed a charge on April 5, 1977 (16-CA-7127) encompassing the allegations later contained in the Consolidated Amended Complaint (Paragraph 15) which issued on March 20, 1978. This charge was withdrawn by the Union on April 27, 1977 and was approved by the Regional Director for Region 16 without prejudice. Thereafter on May 9, 1977, the charge was filed in 16-CA-7201. The initial Consolidated Complaint which issued on November 9, 1977, did not include the allegations contained in Paragraph 15 of the subsequent Amended Complaint.

This is not the routine case involving only conduct or acts at one of an employer's many plants. When we look at the broad picture, the light focuses upon an orchestrated effort by the four unions involved to blend nonplant employees into its negotiating committees and a pattern evolved whereby the management hierarchy at the four plants engaged in a substantially similar course of conduct in expressing its opposition to the participation of outsiders in the bargaining process. Under these circumstances, I believe the "catch-all" phrase in the charges was legally sufficient to include the allegations complained of here since they were related to the same course and conduct pertaining to the bargaining process. Accordingly, I find the General Counsel properly exercised his discretion in expanding upon the specific allegations in the charge.

I do not agree with Respondent's contention that the issues concerning the Union leave and vacations or payment to committee members for working time lost in negotiations should be deferred to the arbitration process in accordance with *Collyer Insulated Wire,* 192 NLRB 837 and *Dubo Manufacturing Corp.,* 142 NLRB 431. An arbitral interpretation of the contracts would not fully resolve the basic issues in this case—whether the Respondent's conduct was designed to interfere with the Union's statutory right to select is representatives for bargaining. To defer to arbitration would only fragmentize the issues and would not effectuate the purposes of the Act. Nor do I find merit in Respondent's contentions that the revocation by the General Counsel of the original deferrals

[75] Case No. 29-CA-5366 filed December 10, 1976.

of Case Nos. 29-CA-5785 (16-CA-6909) and 29-CA-5788 (16-CA-7001), both involving the denials of union leaves, was improper.

F. *The Baltimore Plant*

The Union (Baltimore) has been the bargaining representative of the Baltimore employees for more than 30 years.[76] The most recent contract which preceded the negotiations involved herein ran from July 24, 1974 to July 24, 1977. (G.C. Ex. 23.) Contract negotiations have always taken place in the plant[77] and the members of the Union's bargaining committee, all employed at the Baltimore plant, were paid by the Respondent for the lost work time spent in negotiations.

The allegations of the Complaints relating to the Baltimore plant, described in substance below, will be considered *seriatim.*

Case No. 29-CA-5783 (G.C. Ex. 1 kk)

Paragraph 11(a), (b), and (c). Between September 28, 1976, and November 2, 1976, Respondent denied Union and/or vacation leave to the Baltimore employees while simultaneously refusing to permit Port Ivory plant negotiations outside normal working hours, with an object of preventing said employees from participating in the Port Ivory negotiations.

The above allegations have been discussed in the section of this Decision relating to the Port Ivory plant, and need not be repeated here.

Paragraph 13(a), (b) and (c). Between January 17, 1977 and February 4, 1977, the Respondent denied Union and/or vacation leave to the Baltimore employees while simultaneously refusing to permit Kansas City plant negotiations outside normal work hours, with an object of preventing said employees from participating in the Kansas City negotiations.

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[76] The bargaining unit is described as follows: All employees employed at its Baltimore plant exclusive of the Plant Manager, supervisory employees, staff employees performing work of a confidential nature and employees in a leave of absence due to lack of work. There are approximately 500 employees in the bargaining unit.

[77] Except for a period during a 1971 strike.

The above allegations have been discussed in the section of this Decision relating to the Kansas City plant, and need not be repeated here.

Case No. 29-CA-6055 (G.C. Ex. 1uu)

The following two allegations described below will be considered together.

Paragraph 10. During May through November, 1977, the Respondent refused to permit contract negotiations to be held on the plant premises and refused to pay employees for lost work time spent in negotiations, with an object of forcing the Union not to have outsiders on its negotiating team.

Paragraph 11. From May through July 1977, the Respondent refused to meet or engage in bargaining if outsiders were present and participated on the Union's negotiating team.

As stated above, contract negotiations have always been conducted in the plant except for a period during the 1971 strike and the employees had always been paid for the lost working time spent in negotiations. The Union's attorney, Blum, was present and participated in the 1971 negotiations when they were held in the plant.

Be letter dated April 27, 1977,[78] to Plant Manager Graham relating to the forthcoming contract negotiations, Donnellon said the Union would select 19 members from the Baltimore payroll to serve on its negotiating committee and reserved the right to have additional members, not on the Baltimore payroll, serve on its committee. Donnellon also stated the parties would meet in the plant with no loss of pay to the Baltimore employees serving on the Committee, as had been the practice. (G.C. Ex. 110.) Graham responded by letter, dated May 3, stating it was the Respondent's intention to bargain "using the same process and guidelines as were used in 1974." (G.C. Ex. 111.) On about May 10, the parties agreed to meet on Tuesday, May 17, at 9:30 a.m. in the main conference room in the plant. In Donnellon's letter to Graham, dated May 11, Donnellon stated he would also arrange for another bargaining session for May 20. (G.C. Ex. 113.) By letter also dated May 11,

[78] All dates hereinafter refer to 1977 unless otherwise indicated.

Donnellon submitted the names of 19 Baltimore employees who would serve on the Union's committee. (G.C. Ex. 114.) The letter stated the names were being furnished to enable the Respondent to arrange shift changes, where necessary, to make the Union's committee members available for bargaining sessions. The letter did not refer to outsiders. On several occasions prior to May 17, Graham asked Donnellon if he would have outsiders on the Union's bargaining committee but Donnellon did not commit himself.[79] Prior to the May 17 meeting, Donnellon notified McCauley, Hatton and Jones of the opening bargaining session for May 17 and asked them to send a representative to attend the meeting.

On the morning of May 17, employees of the other three plants appeared on the scene—Sal Deanovich (Port Ivory), Daniel Calgrove (Dallas) and Keith Firth (Kansas City).[80] It should be noted at this point, the Baltimore plant policy, as in the other three plants involved herein, was that employee visitors from other plants do not have free access to visit the plant but they are conducted around the plant on a guided tour. The three outsiders told the guard at the gate to inform Donnellon they were there. They also told the guard they were there to assist in contract negotiations. The head of security, Jones, came to the gate, spoke to the guard and then made a telephone call. Burroughs, a group manager and admitted supervisor, then appeared at the gate. Burroughs told the outsiders Donnellon got off work at 4 p.m. and they could see him then. He told them to leave. When Calgrove told Burroughs they were there to participate in contract negotiations, Burroughs told them there would be no bargaining that day.[81] The outsiders then went across street from the gate to await Donnellon.[82] In the meantime, Donnellon had been called by the guard and was asked to come to the gate to talk to

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[79] Transcript page 1883.

[80] They had been asked by their respective Unions to attend the May 17 meeting. They were not there on Union leave but had used a vacation day.

[81] Graham testified he was told of the presence of the outsiders at the gate and realized Donnellon intended to have them participate in the negotiations. He instructed Burroughs to tell the outsiders they could see Donnellon when he completed his shift.

[82] Based on the credited testimony of Calgrove and Deanovich. Burroughs did not testify.

them. He came out and spoke to the three outsiders who were then across the street. After receiving an account of what had occurred, he then spoke to Burroughs. He told Burroughs they were members of his negotiating committee but Burroughs said they would not be allowed in the plant. Donnellon reentered the plant and went to the conference room. He told the Union committee members present that since the outsiders were denied entry and the Company representatives had not yet shown up, it appeared to him the Company had cancelled the meeting and he returned to work.[83] The other Union committeemen also returned to their work. Graham testified he left his office at about 9:30 for the conference room. En route he was told by one of the Union committeemen that Donnellon told him the meeting had been cancelled. When he came to the conference room a few minutes after 9:30, the Union committee was no longer there. Later that morning, Donnellon and Graham accused each other of cancelling the meeting. Donnellon's position was that Graham had not appeared at the conference room until after the Union committee had left and also that Graham refused entry to three members of the committee. Graham said he would not permit the outsiders to negotiate a contract for the Baltimore plant. Donnellon said if the Respondent would not permit the outsiders to participate in the plant, perhaps the parties should meet off the plant premises. Graham said that having the outsiders appear represented a change in the bargaining procedure and he was not prepared to bargain right then. He said he would consider the impact of this change and would communicate with the Union in a few days.[84] Graham called for a special meeting with the Union's Executive Board for June 1 by letter dated May 26 to let the Union know his position "regarding your proposed changes in the bargaining process." He also stated if

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[83] Donnellon placed his return to work about 9:37 a.m.

[84] Based on the testimony of Donnellon and Union Treasurer Shemenski. To a substantial extent, Graham's testimony is not inconsistent with theirs. However, I discredit his testimony that he did not tell the Union he would not permit outsiders in the plant to participate in contract negotiations. He testified he told the Union he would allow people to come into the plant on plant tours in response to a question why he would not let the three outsiders into the plant. (Transcript 1889-1890; 1911-1913.)

the Union was prepared to bargain exactly as in 1974,[85] he was prepared to make the June 1 meeting, the first bargaining session. (G.C. Ex. 119.) At this meeting, Graham contended the participation of the outsiders constituted a change from prior bargaining practice and the Union took a contrary position. Donnellon credibly testified Graham stated he had no intention of meeting in the plant with outsiders present.[86] By letter dated June 8, Donnellon stated that in view of the Respondent's position on the participation of outsiders, the Union was forced to meet outside the plant. He suggested meeting at a local motel. (G.C. Ex. 124.) Although Graham testified the Union initiated the proposal to meet off the premises, the record shows it was made after Graham wouldn't permit outsiders in the plant.[87] After an exchange of letters, in a letter dated June 28, Graham said the Company was ready to meet in the plant on July 6, to begin bargaining "in exactly the same manner as in 1974." (G.C. Ex. 131.) Donnellon responded by letter dated June 30, agreeing to the July 6 date with the *entire* committee being present in the plant or at a local motel if the Company still insisted on refusing to permit entry to the outsiders. (G.C. Ex. 133.) Finally at a meeting on July 14, the parties arranged to meet on July 18 at a local motel. Graham said he would not pay the Baltimore employees for working time lost in negotiations but they would be granted Union leave. He also stated the parties would split the cost of the motel accommodations. The Union agreed to meet on those terms but under protest.

The first bargaining session took place on July 18, at 9:30 a.m. at a local motel. Also present on behalf of the Union were McCauley (Port Ivory), Hatton (Dallas), and Jones (Kansas City).[88] They were identified by Donnellon as members of the Union's bargaining committee. Graham then asked each of the outsiders the series of questions prepared by Larsen of the

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[85] Obviously without the participation of outsiders.

[86] Transcript 1015-1016.

[87] Transcript 1900-1901; 1911-1913.

[88] They had been called by Donnellon to attend. As noted in the Kansas City section of this Decision, the Kansas City management was made aware by July 20, of Jones' participation.

Respondent's Cincinnati headquarters concerning their role.[89] They made clear they were present on behalf of the Union (Baltimore) to assist in negotiating a contract for the Baltimore employees.[90] After this question and answer period, a 45 minute recess was taken at the request of the Respondent.[91] When they resumed, Graham asked each of the outsiders again which organization they were representing at the bargaining session. Each said they were there representing only the Union (Baltimore). Donnellon then raised objections to the refusal of the Respondent to pay the Baltimore employees for lost working time. The parties then discussed the substantive issues. Bargaining sessions were held each of the five working days. The contract expired and the employees continued working until a new agreement was reached in December. Outsiders were present only at the first bargaining session on July 18 and on the day the contract was signed.

The above facts clearly show the Respondent was prepared to, and would have bargained in the same manner as in 1974, i.e., in the plant and the Union bargaining committee employees would have been paid for the lost working time spent in negotiations, *provided* the Union did not have the outsiders on its negotiating team. Graham did not know whether outsiders would appear at the first bargaining session scheduled for May 17. When the outsiders did appear on the scene on May 17, the session was aborted and it is clear the Respondent would not have engaged in bargaining that day in the plant with outsiders present. It was only because the Respondent refused to permit the plant premises to be used, as in the past, if outsiders participated in the bargaining that the Union suggested meeting off the premises.

Although as Graham testified, there was a Company policy restricting employee visitors from other plants to guided tours, the Union's attorney was permitted in the plant to participate in

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[89] Transcript pages 1925-1926.

[90] G.C. Ex. 139, pages 5-17.

[91] G.C. Ex. 139, pages 18-19. It appears to be more than coincidence that Port Ivory Manager Robinson adjourned his meeting after questioning the outsiders pursuant to instructions from Larsen. (G.C. Ex. 11.) And Plant Manager McIntire at Kansas City recessed the meeting for 30 minutes after similar questioning. (G.C. Ex. 53.)

the 1971 negotiations. In distinguishing access to the plant by Blum for bargaining as compared to the outsider employees, Graham testified as follows:

> Q. Inasmuch as you had permitted Mr. Blum, or the Company had permitted Mr. Blum to attend the negotiations in the plant in 1971, what was your reason for not permitting negotiations—negotiators from New York and Dallas and Kansas City entering the plant in 1977 as Mr. Blum had done in 1971?
> A. As I stated earlier on the 17th of May, the whole affair caught me off guard. I had not prepared myself, had not talked to my personnel manager, and had not talked to my IRD contact to get any advice from him around the whole issue of having people from other P & G locations there. So on the 17th of May it was more a matter of how to deal with it at this point in time.
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> J. Then you did some homework?
> A. Then I started to do some homework and on the—
>
> J. You also found out Mr. Blum, when you did your homework, you found Mr. Blum had been there in the past?
> W. Yes.
>
> J. Yes. Why did you distinguish between these people and Mr. Blum as far as letting them into the plant?
> W. Mr. Blum from my standpoint is very familiar with the plant, with the—say the plants in terms of what was going on in the plant and knows the extensive issues that exist within the plant. I viewed him as being an attorney. I viewed him as being one who would know how to conduct himself within the plant in relationship to his comments to any other employees. I had no idea, neither did I ever meet those gentlemen or the people that did show up. They were just names to me. I didn't know who they were. I didn't know what interferences they might

provide to the negotiations from a standpoint of going on recess and mixing with people in the plant. To me it was just two different ball games. (Transcript pages 1914-1916.)

* * *

Q. If the Union had withdrawn its proposal to have outside negotiators in—meeting out—meaning outside employees of P & G, present instead had requested that Mr. Blum be substituted as their outside negotiators, would you have permitted Mr. Blum to enter P & G premises as in 1971?
A. Yes. (Transcript page 1917.)

Paragraph 12. From May 1977 to date,[92] the Respondent negotiated in bad faith with no intention to enter into a final or binding agreement.

The record shows a contract was executed by the parties on December 27, 1977, after a series of negotiating sessions beginning in July. (G.C. Ex. 22.) The signatures of the parties were on a single instrument and contained the signatures of the plant manager and the Union's negotiating committee, including those of Hatton (Dallas) and Jones (Kansas City). The General Counsel explained at the hearing, he was not relying on the Respondent's position on substantive proposals to support the above unfair labor practice allegation but rather on the Respondent's throwing roadblocks to prevent the participation of outsiders in the negotiating process.[93]

Discussion

The law is clear that a collective bargaining representative may select, absent rare circumstances, whomever it wishes to represent it in collective bargaining negotiations.[94] The basic

[92] The Complaint issued on December 15, 1977.

[93] Transcript pages 977-979.

[94] *Indiana & Michigan Electric Co.*, 235 NLRB No. 159, supplementing 229 NLRB 576, enf'd 101 LRRM 2470 (CA 7) (1979); *Minnesota Mining & Mfg. Co.*, 173 NLRB 275, enf'd 415 F.2d 174 (CA 8) (1969).

issue involved in this case is whether the Respondent engaged in conduct which unlawfully interfered with the right of the Unions involved to select nonplant employees to serve on their plant bargaining committees.

A collective bargaining relationship has existed between the Respondent and each of the four unions for at least 25 years. Each union is the bargaining representative only at its particular plant and each contract is only with that particular union. Each contract had a different expiration date beginning with the Port Ivory plant on November 18, 1976, followed by Kansas City on February 3, 1977, Dallas on April 8, 1977 and lastly, Baltimore on July 24, 1977. Each union is an independent labor organization. Traditionally in past years, each plant's negotiating committee consisted only of the employees at the plant with no outsiders participating, except for its attorney on occasions. All prior negotiations have been held in the plant and the employees on the negotiating team were paid for lost working time spent in negotiations.

In 1975, the four unions, forming the Amalgamation, decided that in the forthcoming negotiations, each union would have a member from each of the other three unions as a member of its own negotiating team. Other of the Respondent's plants are likewise, represented by independent labor organizations but they were not members of the Amalgamation. It is uncontroverted an ultimate objective of the Amalgamation was to establish a multiplant unit for bargaining. It is also clear that the Respondent, from its corporate headquarters, to its plant hierarchies, was opposed to a multiplant bargaining unit and to the concept of outsiders on the plant committees. The Respondent was concerned that the participation of outsiders in the bargaining was a step along the path to a multiplant unit and it was intent on attempting to scatter obstructions along the way. For the first time, beginning with the Port Ivory plant and through the Baltimore plant negotiations, each union attempted to bring in outsiders—representatives of the other three unions, to participate and assist in its bargaining negotiations for a new contract. The Respondent, at each plant, acknowledged the right of the Unions to bring outsiders into the negotiations. However, at each plant, the Respondent accused the Union

involved of changing the bargaining procedure by wanting to include outsiders on its bargaining team. In each instance, the Respondent attempted to retain the status quo as in past years—only plant employees on the Union's negotiating team, with bargaining taking place in the plant and the employees on the committee being paid for lost working time spent in the negotiations. As found above, had the Unions not attempted to include outsiders on their bargaining team, the Respondent, at all four plants, would have continued to make the plant premises available for bargaining and would have continued to pay the employees for the lost working time spent in negotiations. By utilizing the outsiders on their bargaining teams, the Union were engaging in what has been termed a form of "coordinated bargaining." However, the Unions were not using this technique as a clear present danger to the destruction of the single plant units and the establishment of a multiplant unit which was an ultimate aim of the Unions. When outsiders first appeared at the bargaining table at the four locations at the request of the Union involved in the bargaining, questions prepared by the Respondent's corporate headquarters were propounded by the Respondent's negotiators to ascertain the role of the outsiders at the bargaining table. In each instance, it was made clear to the Respondent the outsiders were there to assist the Union then engaged in bargaining and they were not there as a representative of the bargaining agent at their home plant. At no time, before or during bargaining, did the bargaining representative indicate in any manner to the Respondent, the outsiders were there for the purpose of bargaining on a multiplant basis. The position of the Respondent, at each plant was that because of its security policy, it would not permit outsiders into the plant to participate in the negotiations. The record shows that plant management discussed the outsider issue with the personnel at the Respondent's corporate headquarters. The advice given was that by bringing in outsiders on their bargaining teams the Unions were changing the bargaining procedures and the plant management had the right to no longer make its premises available for bargaining. I am not convinced the refusal of the Respondent, at each of the plants, was based upon its security policy of non plant employees being permitted only on guided tours. The Respondent contends it

was not required to change its security policy to permit the outsiders into the plant to participate in negotiations. At first blush this argument may appear to have merit but then pales. I am convinced the Respondent seized upon its security policy as a pretext to dissuade and to make it more difficult for the Unions to include outsiders on their bargaining teams. As mentioned above, attorneys for the Unions participated in negotiations in the plant in past years and no objections were raised to their presence in the plant. I am not impressed with Respondent's argument it would have been difficult to police the conduct of the outsiders in the plant during bargaining recesses, particularly where, as here, only three outsiders were to participate in the bargaining. An employer is not under any statutory obligation to make the plant premises available for bargaining negotiations or to pay employees on the Union bargaining committee for lost working time. The Respondent appears to argue the problems of access to the plants by outsiders and paying the employees on the bargaining committees were resolved by mutual agreement. I do not agree. Simply put, the Unions wanted the outsiders on their teams. In all other respects they wished to bargain as the parties had bargained for more than 25 years. I do not consider the addition of the outsiders to assist in the negotiations as a change in the bargaining process any more than would be the addition of an attorney, a pension expert, an economist, or anyone whom the bargaining representative believed could be of assistance in bargaining. On the other hand, the Respondent refused to permit bargaining on the plant premises and refused to pay the employees for working time lost because outsiders were to participate. Under these circumstances, I find the Respondent discontinued the practice of making its premises available for bargaining and paying the committee members for lost working time spent in negotiations, a practice in existence for more than 25 years, in retaliation over the Unions' exercise of their statutory right to select representatives from other of the Respondent's bargaining units to assist each other in collective bargaining negotiations. Such conduct I find to be violative of Section 8(a)(1) and (5) of the Act.

When the Respondent was unsuccessful in its attempts to induce the Unions to exclude the outsiders, it initially discontinued the practice of bargaining in the plant and paying the plant employees on the Committee for the time lost. The next phase then began—the bargaining away from the plant and the denial of Union leave and vacation time. The Board and the Courts have found an employer unlawfully interfered with employee free choice of bargaining representatives where multiple bargaining units existed and the employer refused to meet with a union negotiating committee representing a particular bargaining unit because the committee included outside negotiators from units other than the one for which the negotiations were being conducted.[95] In the present case, the Respondent did not refuse outright to meet with the Union bargaining committees which included the outsiders. It did however impede the opportunities for the outsiders to be present at the negotiations.

Each of the Unions made requests to use Union leave for the purpose of attending negotiations at another of the plants. At all four plants, the requests for Union leave were denied by the Respondent on similar grounds—that attendance at negotiations at another plant to represent the other union was not local Union business as it interpreted the contract provision. Each of the four contracts contains a clause which allows employees up to 30 days uncompensated leave per year to attend to "Union" business. The preamble of each agreement defines "Union" as the contracting labor organization. In view of the statements by the Union representatives that their role at the negotiations elsewhere was to assist that local in negotiating a contract, the Respondent's interpretation was reasonable. The Respondent contends it has no obligation to liberalize or abandon the contract provision and equally employees have no right to be granted leave to go elsewhere and represent employees in other plants on behalf of other unions other than by applicable contract provisions.

Having been unsuccessful in obtaining Union leave to participate in negotiations at other plants, attempts were made

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[95] *Minnesota Mining & Mfg. Co., supra; Standard Oil Co. v. N.L.R.B.*, 322 F.2d 40 (CA 6) (1963).

to use vacation time for such purpose. Jones, the Kansas City Union president, was denied permission by his foreman, Blasche, to take off on March 25 as a vacation day but nevertheless, absented himself and attended the Dallas negotiations.[96] Upon his return he received a one day disciplinary suspension and an entry was recorded in his personnel file. I have found Jones was denied permission to be off on March 25, to prevent him from attending the Dallas negotiations and not for valid business reasons. Accordingly, I find such denial of vacation leave and the subsequent disciplinary action were discriminatory in their application and violative of Section 8(a)(1) and (3) of the Act. Although an employer has the right to discipline an employee for cause, including absenting himself without permission, such right is not available where the underlying reason is to deprive an employee of his Section 7 rights. As stated above, the motivation for denying the time off was to prevent Jones from attending the Dallas negotiations and the subsequent disciplinary action imposed upon him was in furtherance of the Respondent's concerted efforts to discourage and prevent as best it could the participation of outsiders in the negotiations.

Turning now to the July 18 incident when Jones was absent and attended the Baltimore negotiations. His wife called beforehand that he would be absent. Upon his return, he received a 5-day suspension. It should be remembered Jones had worked in the plant for 44 years and had a good attendance record. In the past he had taken time off after calling in beforehand and was not asked the reasons for his absence upon his return. In this particular instance, the Respondent was aware he had been at the Baltimore negotiation meeting that day. Here too, I find the motivation for the 5-day disciplinary suspension imposed upon Jones was because he participated in the Baltimore negotiation meeting, a protected activity, and was not based upon a valid business reason. I find the suspension violative of Section 8(a)(1) and (3) of the Act. I have also found that Donnellon (Baltimore) was denied a vacation day for October 15 to prevent him from

[96] He had already been denied Union leave to participate in negotiations at the Port Ivory plant.

attending the Port Ivory negotiations. Such conduct I likewise find violative of Section 8(a)(1) and (3) of the Act.

After the parties had begun negotiations away from the plants, the Respondent rejected the Unions' requests to meet evenings or weekends at the Port Ivory, Kansas City and Dallas plants. Parties are obligated to meet and confer at reasonable times and hours. This does not mean an employer must concede to a Union's request to meet outside of normal working hours in all cases. The Respondent was aware the Unions intended to bring into the negotiations representatives from the other three unions. The plant managements were all aware when the bargaining meetings were taking place[97] and were supportive of each other in impeding the attempts of the representatives to take time off to attend—first on the denial of Union leave and then denials of vacations where the purpose was to attend the negotiations.

In the *Indiana and Michigan Electric Company* case, cited *supra*, the employer refused to grant uncompensated leave to employee representatives from one bargaining unit to permit them to engage in bargaining as a member of another bargaining unit's bargaining committee at the same time the employer refused the Union's request to bargain during nonworking hours. The Board in that case stated, "while Respondent was under no obligation to acquiesce to the Union's demands for bargaining sessions outside normal business hours, it could not simultaneously refuse its employees'

[97] Plant Manager Graham (Baltimore) admittedly was aware that the Port Ivory negotiations were scheduled for October 6, when he denied Union leave to Donnellon. Personnel Manager Capshaw (Baltimore) denied Union leave and a vacation day to Donnellon for October 15. At the time he was aware a Port Ivory negotiation meeting was scheduled for that day. Later he told Donnellon the Port Ivory meeting had been cancelled. He obviously was made aware of the cancellation by the Port Ivory management even before the Port Ivory management had notified the Union (Port Ivory) of its unavailability to meet on October 15. In Kansas City, Blasche, a boiler room foreman there, was aware of Jones' attendance at the Dallas and Baltimore negotiations. Robinson testified he told Plant Manager McIntire (Kansas City) and Graham (Baltimore) their employees were at the October 6 meeting in Port Ivory. (Transcript pages 1327-1330.) Industrial Relations Manager Paton (Dallas) admitted he knew the Port Ivory plant was engaging in bargaining on the dates requested by Dallas employees for Union leave.

requests for leave without pay to attend contract talks because these employees were not employees of the unit involved. Thus, if Respondent refused a request for unpaid time off it then was incumbent upon Respondent to engage in negotiation sessions when employee representatives could attend, even, if necessary, outside working hours." The Board found that by refusing either alternative, the employer interfered with the Union's right to select its own bargaining representative in violation of Section 8(a)(5) of the Act. In the present case, the Respondent likewise refused to allow uncompensated time off to employees to act as a bargaining representative of another labor organization for the purpose of negotiating a contract at the plant where this other labor organization was the collective bargaining agent. The facts are somewhat dissimilar and the question arises whether the distinctions require a different result. In the cited case only one labor organization was involved, representing employees in four separate bargaining units whereas here we have four independent labor organizations each representing separate bargaining units. Be that as it may, a collective bargaining representative may select whomever it wishes to assist in collective bargaining negotiations with an employer and is not restricted to selecting only members of its own labor organization. Thus, the Unions here had the choice of its own negotiators without interference by the Respondent. The Respondent did acknowledge the Unions had such choice. In prior bargaining, in the cited case, the Union had made use occasionally of outside negotiators and the furthest distance between any two plants was 1[illegible] miles. In the present case there was no precedent for the use of nonplant employees to participate on a negotiating committee and the distance between plants was considerably further. I do not attach any significant difference in the fact that here the Unions for the first time intended to use outsiders. As I have found above, the Unions did not attempt to engage in multiplant bargaining in these negotiations—in both cases the concern of the employers was the overhanging cloud of the possibility of a multiplant unit. And because of the distances involved in the present case, it was more difficult for outsiders to make themselves available to participate in the bargaining process, particularly where the bargaining was during the week and not

on weekends. After negotiations began away from the plant, the Respondent had rejected requests to meet evenings and weekends. In the cited case, the denial of the leave was based in part upon the effect on the plant operation caused by the absence of the outside negotiators. In the present case, there was no such contention. Here, unlike the cited case, the Respondent relied on its interpretation of the Union leave provision in the contracts when it denied Union leave to the employees who sought the uncompensated leave to participate in the negotiations at the other plants. The Respondent had denied Union leave in the past where it deemed such leave not to be "Union" business. In one instance involving the Dallas plant, the refusal to grant Union leave led to arbitration. In that dispute the Union (Dallas) had asked for Union leave to send a representative to the Respondent's Alexandria, Louisiana plant then engage in negotiations to explain its contract to the Alexandria union. The arbitrator ruled in favor of the Respondent, stating it was not particularly in the interest of the Dallas union and it was straining to find other than a remote or incidental benefit to the Dallas union. The employee in that case went on the weekend to meet with the Alexandria union to perform his mission.

The Respondent, by denying the uncompensated leave and vacation days, where the purpose of the leave was to participate as a member of the Union negotiating committee at another of the plants, effectively impeded the availability of such representatives to participate. In Port Ivory, outsiders were present only at the first negotiating meeting on October 6. Union representatives at the other three plants had been refused Union leave to attend. Bramble (Baltimore) switched shifts with another employee and attended. Jones (Kansas City) took a night flight to New York, attended the bargaining session and then returned to Kansas City in time to be present at his shift. Middlebrook (Dallas) was on vacation at the time. Outsiders did not participate in later meetings at Port Ivory. Donnellon was refused a vacation request to attend the scheduled October 15 meeting which was later cancelled. At the first bargaining session in Kansas City, representatives of the other three plants were present. McCauley was on vacation at the

time. I assume Wilkins (Baltimore) and Hatton (Dallas) who were present were also on vacation since the three unions were all denied Union leave to attend the Kansas City negotiations. No outsiders attended later negotiations. In Dallas, representatives of the other three unions were present at the first negotiation session. Donnellon (Baltimore) was on vacation at the time. Jones had been denied a vacation day but attended. The record is silent as to the status of Deanovich (Port Ivory) but since Union leave had been denied, it is fair to assume he was on vacation. In Baltimore, McCaulely, Hatton and Jones were present at the first negotiation session on July 18. As described above, Jones was suspended afterwards. The record is silent as to the status of McCauley and Hatton but since Union leave was not available, I assume they were on vacation at the time.

The Respondent refused to grant Union leave to attend and participate in the negotiations at the other plants as a representative of the labor organization where the contract negotiations were taking place. Thus, the Unions were effectively restricted in selecting the particular individuals to be brought in. Not being able to get uncompensated time off or to get vacation days where the Respondent believed such requested time off was to attend the negotiations left the Unions with no alternatives except to send whoever was on vacation at the time.

Because of the distances between the plants the problem in being able to attend was not limited merely to meeting during working hours or nonworking hours to hold negotiations. Were some of the negotiations to be held on weekends, the outsiders would have been more readily available to attend but the Respondent had rejected such requests.

In its concerted efforts to resist the use of outsiders in the negotiations, the Respondent first caused the bargaining to be removed from the plant premises and ceased paying the plant employees for the lost working time spent in negotiations. It refused the Unions' requests to meet after normal working hours and on weekends. It then refused to grant Union leave and refused vacation requests. These combined actions, viewed

in total, can only be seen as an attempt to restrain the outsiders from participating in the negotiations, thus interfering with the Unions' rights to freely choose their bargaining representatives. I have found that the Respondent's interpretation of the Union leave was reasonable, i.e., the purpose of the leave requested was not "Union" business. The denial of Union leave effectively precluded the Union then engaged in bargaining from selecting its own representatives for contract negotiations. The contract clause cannot be interpreted to deny any other type of uncompensated leave to the selected representatives. In light of the Respondent's actions designed to impede the participation of outsiders in the negotiations, as described above, it seems to the undersigned the Respondent was obligated to provide an alternative form of uncompensated leave to the outsiders, particularly where, as here, the Respondent does not contend their absence would have interfered with its business operations. Accordingly, I find the denial of uncompensated leave to the outsiders, where the purpose of such leave was to participate in the contract negotiations at another of the Respondent's plants, restrained the contracting Unions' right to select their bargaining representatives and violated Section 8(a)(1) and (5) of the Act.

The Remaining Allegations

1. The General Counsel has alleged that the Respondent, at its Port Ivory and Baltimore plants, refused to bargain if outsiders participated in the bargaining negotiations.

The record does not support these allegations. Rather, it is clear the Respondent at all four plants refused to make its premises available for negotiations if outsiders were present. It did not, however, refuse to meet off the premises. Accordingly, I shall dismiss these allegations.

2. The Dallas complaint alleges the Respondent refused to meet with the full Union Bargaining Committee and refused to schedule negotiation sessions with 24 hour notice.

The record shows the Respondent did meet with the Union's Bargaining Committee, including outsiders, albeit off

the Respondent's premises. The record does not support the allegation relative to 24 hour notice. Accordingly, I shall dismiss these allegations.

3. I find, as alleged in the Port Ivory case, Plant Manager Sharfe told Port Ivory employees the participation of outsiders in the Port Ivory negotiations would result in a less favorable contract. Such statement constitutes a threat violative of Section 8(a)(1) of the Act.

4. The Baltimore complaint alleged the Respondent negotiated in bad faith with no intention to enter into a final and binding agreement. As found above, the parties executed a collective bargaining contract on December 27, 1977, after a series of negotiating sessions beginning in July. In support of this allegation, the General Counsel relies on Respondent's action to prevent outsiders from participating in the bargaining at Baltimore. I find the evidence insufficient to support the contention that the Respondent had no intention to enter into a contract. Accordingly, I shall dismiss this allegation.

5. I have found, as alleged in the Dallas and the Port Ivory complaints respectively, that Industrial Relations Manager Paton (Dallas) and Personnel Manager Jones (Port Ivory) threatened employees with disciplinary action if they used Union leave to attend bargaining negotiations at other of the Respondent's plants. Inasmuch, I have found the Respondent's interpretation of the contract provision pertaining to Union leave to be reasonable, i.e., such activity did not constitute local Union business, I shall dismiss these allegations.

6. The General Counsel contends in both the Dallas and Kansas City cases, the Respondent refused to execute the agreed upon contracts where such documents would contain the signatures of the Union's entire bargaining committee.

Section 8(d) of the Act impose as a good faith bargaining obligation upon both employers and labor organizations: "the execution of a written contract incorporating any agreement reached if requested by either party . . . ." Neither party may refuse to sign the contract once an agreement is reached.[98] In

[98] *H.J. Heinz v. N.L.R.B.*, 311 U.S. 514 (1941).

both Dallas and Kansas City the plant manager signed a separate instrument containing only his signature with markings which precluded the possibility of signatures by the Union committee. Each plant manager refused to sign a copy containing the signatures of the Union Committee. At Kansas City, the parties have executed separate instruments. No contention is made that a valid collective bargaining agreement does not exist. In April 1978, during the course of the instant hearing and one year after the Dallas contract had been agreed upon, a single instrument was finally signed by the parties in Dallas. The instrument included the signatures of the outsiders.

In *Stylecraft Furniture Company,* 111 NLRB 930 (1955), the Board found a Section 8(a)(5) violation where the employer, after having reached agreement on the contract, refused to sign the contract without all the individual employees signing the agreement. A similar result was reached in *H.N. Thayer Company,* 99 NLRB 1122 (1952). The common rationale for a finding of violations in those cases was that the employer was trying to undermine the representative status of the Union.

It is clear in the present case, the Respondent's refusal to sign a single instrument was an attempt to keep from recognizing the outsiders as members of the bargaining committee. Traditionally, the entire Union negotiating committee had signed the contract albeit no outsiders were on the committee. It was only in the face of the Unions' inclusion of the outsiders that the Respondent has refused to sign a single instrument. Respondent counters by stating it was the Union who refused to sign the agreement, and it was willing to sign a single agreement signed only by the union president and the Respondent. As authority for this proposition, Respondent cites several cases upholding the validity of multiple instruments constituting a single contract. The cases cited, however, do not address a refusal to sign an agreement, but only to the question of whether a valid contract existed. It is clear that Respondent's actions were calculated at each turn to frustrate the Unions' choice of bargaining committee representatives. Having acknowledged the Unions may insist on the inclusion of "outsiders" on the bargaining committees, the Respondent could not then refuse to recognize these outsiders as members of the

committee after an agreement had been reached by refusing to sign a single instrument containing their signatures. Accordingly, I find the Respondent, at its Dallas and Kansas City plants, violated Section 8(a)(1) and (5) of the Act by refusing to sign the agreed upon contract containing signatures of outsiders. The signing of the single instrument at Dallas one year after its initial refusal to sign does not preclude the unfair labor practice finding.

Conclusions of Law

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The following are labor organizations within the meaning of Section 2(5) of the Act and at all times relevant herein, each has been the exclusive bargaining representative of the employees in the appropriate unit shown below for purposes of collecting bargaining with respect to wages, rates of pay, hours of employment, and other terms and conditions of employment within the meaning of Section 9(a) of the Act.

(a) *Independent Oil & Chemical Workers, Inc.* All production and maintenance employees at the Port Ivory plants, including clericals, laboratory employees, and fire inspectors, but excluding confidential employees, professional employees, the nurse, guards, all managers and employees on leave of absence due to lack of work and supervisors as defined in the Act.

(b) *Independent Oil & Chemical Workers.* All employees employed at its Baltimore plant exclusive of the Plant Manager, supervisory employees, staff employees performing work of a confidential nature and employees in a leave of absence due to lack of work.

(c) *Independent Oil & Chemical Workers of Kansas City, Kansas.* All employees employed at the Kansas City, Kansas plant and Kansas City Warehouse, exclusive of the plant manager all other members of supervision, the plant

manager's secretary, general production manager's secretary, the personnel manager's secretary, the nurse, and employees on a leave of absence due to lack of work.

(d) *Independent Oil & Chemical Workers of Dallas.* All employees, including the Fire Marshal and the employees in any outside warehouse operated by the Dallas plant, excluding Plant Manager's secretary Operation Manager's secretaries, Industrial Relations Manager's secretary, the Cashier, other staff employees performing work of a confidential nature, professional employees, guards, watchmen, supervisors as defined in the LMRA and employees in a leave of absence due to lack of work.

3. By discontinuing the practice of making its premises available for contract negotiations and paying plant employees serving on the negotiating committee for lost working time spent in negotiations in retaliation over the Unions' exercise of their rights to select representatives from other of the Respondent's bargaining units to assist each other in collective bargaining negotiations, Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) and (5) of the Act.

4. By denying uncompensated leave and/or vacation time to its employees where the purpose of such leave was to participate in contract negotiations as a representative of a labor organization then the bargaining representative at another of the Respondent's plants, the Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) and (5) of the Act.

5. By discriminatorily denying vacation leave to Omer Jones, to prevent him from participating in the negotiations at the Dallas plant, Respondent, at its Kansas City plant, has engaged in unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act.

6. By unlawfully suspending Omer Jones for his attendance at the Dallas and Baltimore negotiations on March 25 and July 18, 1977, respectively, the Respondent, at its Kansas City plant, has engaged in unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act.

7. By discriminatorily denying vacation leave to Walter Donnellon to prevent him from participating in the negotiations at the Port Ivory plant, Respondent, at its Baltimore plant, has engaged in unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act.

8. By refusing to sign an agreed upon contract containing the signatures of nonplant employees on behalf of the collective bargaining representative, the Respondent, at its Dallas and Kansas City plants, has engaged in unfair labor practices within the meaning of Section 8(a)(1) and (5) of the Act.

9. By threatening employees that the participation of nonplant employees on the Union's negotiating committee would result in a less favorable contract for the employees, the Respondent, at its Port Ivory plant, has engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

10. The aforesaid unfair labor practices are unfair labor practices within the meaning of Section 2(6) and (7) of the Act.

11. Except for the foregoing, Respondent has committed no other unfair labor practices under the Act.

The Remedy

Having found that Respondent has engaged in certain unfair labor practices, it shall be recommended that Respondent cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act. I have found that the Respondent suspended Omer Jones for his absences on March 25 and July 18, 1977, for reasons which violated Section 8(a)(1) and (3) of the Act. I shall therefore recommend the Respondent make him whole for any loss of pay which he may have suffered as a result of the discrimination practiced against him. Backpay computations shall be in accordance with *F.W. Woolworth Company*, 90 NLRB 289 (1950), and *Florida Steel Corporation*, 231 NLRB 651 (1977).[99]

[99] See generally *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

Upon the foregoing findings of fact and conclusions of law, and upon the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:[100]

ORDER

Respondent, The Procter & Gamble Manufacturing Company, its officers, agents, successors and assigns shall:

1. Cease and desist from:

(a) Refusing to bargain with Independent Oil & Chemical Workers, Inc., Independent Oil and Chemical Workers, Independent Oil and Chemical Workers of Kansas City, Kansas or Independent Oil and Chemical Workers of Dallas as the collective bargaining representative of the employees in the designated appropriate unit described above by:

(1) Refusing to make its plant premises available to any of the Union mentioned above for the purpose of negotiating a collective bargaining agreement relating to rates to pay, wages, hours, and other terms and conditions of employment of the employees in the designated appropriate unit described above or to pay its plant employees on the negotiating committee for that Union for lost working time spent in negotiations because the Union involved in the negotiations has invited or designated persons not employed in the bargaining unit to attend and participate in the negotiations of a collective-bargaining agreement.

(2) Denying uncompensated leave and/or vacation time to its employees where the purpose of such leave is to attend and participate in contract negotiations as a representative of the Union which is the

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[100] In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order here shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

bargaining representative of the employees at another of the Respondent's plants then engaging in negotiations for a collective bargaining agreement.

(3) Refusing to sign an agreed upon collective bargaining contract because the instrument is to be or is signed by the members of the Union's negotiating committee regardless of whether they are employed in the related appropriate unit.

(b) Suspending or otherwise disciplining employees for engaging in protected concerted activity.

(c) Threatening employees that the participation in negotiations for a collective bargaining agreement by persons not employed in the appropriate unit as representatives of the Union engaging in such negotiations, would result in a less favorable contract for the employees in the appropriate unit.

(d) In any like or related manner, interfering with, restraining or coercing its employees in the exercise of their rights under Section 7 of the Act.

2. Take the following affirmative action which I find necessary to effectuate the policies of the Act.

(a) Make Omer Jones whole for any loss of pay which he may have suffered as a result of the discrimination against him in the manner set forth in the section of this Decision entitled "The Remedy" and expunge the written data relating to such disciplinary action from his personnel file.

(b) Preserve, and upon request make available to the Board or its agents for examination and copying all payroll records, social security records, timecards, personnel records and all other records necessary to analyze the amount of backpay due under terms of this Order.

(c) Upon request of Independent Oil and Chemical Workers of Kansas City, Kansas, execute the instrument embodying the terms and conditions of the collective bargaining contract agreed upon on May 2, 1977, and

containing the signatures of the Union's negotiating committee.

(d) Post at its Port Ivory, Kansas City, Dallas and Baltimore plants, copies of the attached notice, marked "Appendix".[101] Copies of said notice, on forms provided by the Regional Director for Region 29, after being duly signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Region 29, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

IT IS FURTHER ORDERED that the allegations in the complaints be, and hereby are dismissed insofar as they have not been specifically found herein to violative of the Act.

Dated, Washington, D.C. August 31, 1979.

BERNARD NESS

Bernard Ness
Administrative Law Judge

[101] In the event that the Board's Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 80-1275

THE PROCTER & GAMBLE MANUFACTURING COMPANY, *et al.*,
Petitioners,

versus

NATIONAL LABOR RELATIONS BOARD,
Respondent.

ORDER

Upon consideration of the petitioners' petition for rehearing and suggestion for rehearing en banc, and no judge having requested a poll on the suggestion for rehearing en banc,

It is ADJUDGED and ORDERED that the petition for rehearing is denied.

Entered at the direction of Judge Phillips with the concurrence of Judge Haynsworth. Judge Field dissents.

For the Court,

Clerk

FILED
Jan. 8, 1982

SUPREME COURT OF THE UNITED STATES

No. A-820

PROCTER & GAMBLE MANUFACTURING COMPANY, ETC.,
Petitioner

v.

NATIONAL LABOR RELATIONS BOARD

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including June 7, 1982.

/s/ WARREN E. BURGER
Chief Justice of the United States.

Dated this 1st day of April, 1982

QUESTIONS PRESENTED

1. Whether substantial evidence supports the Board's findings that petitioners, in retaliation for the Unions' selection of non-unit employees to serve on bargaining committees, discontinued their long-standing practices of making their plants available for negotiating sessions and of paying plant employees serving on the bargaining committees for working time lost during negotiations, and denied uncompensated union leave and vacation to employees to inhibit their own participation in contract negotiation at other plants.

2. Whether the Board's order was a reasonable and proper means of remedying the unfair labor practices found.

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In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 81-2226

PROCTER & GAMBLE MANUFACTURING COMPANY, ET AL., PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-34a) is reported at 658 F. 2d 968. The Decision and Order of the National Labor Relations Board (Pet. App. 35a-111a) are reported at 248 N.L.R.B. 953.

JURISDICTION

The judgment of the court of appeals was entered on September 4, 1981, and a petition for rehearing was denied on January 8, 1982 (Pet. App. 112a). On April 1, 1982, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including June 7, 1982 (Pet. App. 113a), and the petition was filed on June 3, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioners (the "Company") have plants at various locations throughout the United States, including Port Ivory, New York; Baltimore, Maryland; Kansas City, Kansas; and Dallas, Texas. The employees at each plant comprise a distinct bargaining unit and are covered by a separate collective bargaining agreement with an independent labor organization at that particular facility (Pet.App. 46a).[1] The Unions belong to the Amalgamation of Independent Oil and Chemical Workers (the "Amalgamation"), which was established by independent unions at several of the Company's plants and which has as a goal the eventual establishment of a multi-plant bargaining unit. The Company opposes that goal (*id.* at 46a-47a).

In the past, contracts had been negotiated by the management at each plant and a Union bargaining committee composed of employees from the particular plant. Occasionally, the Union's attorney would be present. The negotiating sessions were held at the plant, and the employees on the Union bargaining committee were paid by the Company for working time lost during negotiations (Pet. App. 48a, 50a, 94a).

At the Amalgamation's September 1975 meeting, the Unions decided that, during the 1976-1977 contract negotiations with the Company, each Union's bargaining committee would include a representative from each of the other three Unions (Pet. App. 47a). Before or during the 1976-

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[1]The Port Ivory employees are represented by the Independent Oil and Chemical Workers, Inc., the Baltimore employees by the Independent Oil and Chemical Workers, those in Kansas City by the Independent Oil and Chemical Workers of Kansas City, Kansas, and the Dallas employees by the Independent Oil and Chemical Workers of Dallas (Pet. App. 44a). The unions are referred to herein individually as "the Union" and collectively as "the Unions."

1977 negotiations, each Union informed its plant's management that employees from other Company plants ("non-unit employees" or "outsiders") might be asked to serve on the Union's bargaining committee (Pet. App. 48a).[2]

In response, management at each plant unilaterally rescinded the long-standing practices of conducting negotiations in plant conference rooms that previously had been made available free of charge, of compensating unit employees for work time lost while attending bargaining sessions, and of paying the entire cost of the transcripts of the negotiating sessions (Pet. App. 48a, 51a, 67a, 69a, 78a-79a, 87a-93a).

When the Union nevertheless insisted on having outsiders on their negotiating teams, the Company took steps to impede the outsiders' ability to be present at the negotiations. Representatives of each of the Unions requested uncompensated, "union business" leave in order to attend negotiations at another of the plants. The Company denied these requests on the ground that such leave was permitted under existing contract provisions only when the union business concerned the employee's local, and not another local.[3] After their leave requests were denied, the employees requested to use single days of personal vacation time to attend negotiations at other plants, but such requests were also denied by the Company (Pet. App. 54a-57a, 64a-65a, 70a).[4] The Company also denied the Union's requests to

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[2]Because the contracts at each plant had different expiration dates, the negotiations at each plant were conducted at different times. There was an interval of approximately two months between the inception of negotiations at each plant (Pet. App. 4a, 48a, 94a).

[3]The Board found this interpretation of the contracts reasonable (Pet. App. 97a).

[4]The Company denied vacation days to employees Omer Jones (Kansas City Union president) and Walter Donnellon (Baltimore Union president) because it knew bargaining meetings were scheduled at other

meet on weekends or evenings in order to accommodate the outsiders (Pet. App. 51a, 69a-70a, 79a-81a).

The Company refused to sign instruments embodying the terms and conditions of collective bargaining agreements agreed upon at Dallas and Kansas City because the documents included the signatures of non-unit employees designated as members of the bargaining committees at those plants (Pet. App. 71a, 81a-83a). Moreover, at Port Ivory, the Company plant manager threatened employees that the Union would not get as favorable a contract—he estimated five cents per hour less—if the outsiders participated in the negotiations because the Company would want to demonstrate to the other plants the disadvantages of belonging to the Amalgamation (*id.* at 60a-63a).

2. The Board, upholding the decision of the Administrative Law Judge, concluded that the Company had violated Sections 8(a)(5) and (1) of the Act, 29 U.S.C. 158(a)(5) and (1) by interfering with the Unions' selection of non-unit employees to serve on the bargaining committees for their respective plants. Specifically, the Board found that the Company had, *inter alia*, discontinued its long-standing practices of making its plants available for negotiating sessions and of paying plant employees serving on the bargaining committees for working time lost during negotiations in retaliation for the Unions' use of outsiders; denied uncompensated Union leave and vacation to employees who intended to participate in contract negotiations at other plants; and refused to sign contracts negotiated at Dallas and Kansas City because the documents included the signatures of non-unit employees designated as members of the bargaining committees at those plants. Also, in agreement

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plants on the requested dates (Pet. App. 55a, 57a). In addition, Jones was suspended for attending contract negotiations in Dallas and Baltimore (Pet. App. 72a-75a).

with the ALJ, the Board found that the Company had violated Section 8(a)(1) of the Act by threatening the employees at its Port Ivory plant with a less favorable contract if the Port Ivory Union insisted on exercising its statutory right to include non-unit employees on its bargaining committee. Finally, the Board agreed with the ALJ that the Company had violated Sections 8(a)(3) and (1) of the Act, 29 U.S.C. 158(a)(3) and (1), by discriminatorily denying vacation leave to employees Omer Jones and Walter Donnellon in order to prevent them from participating in contract negotiations at plants other than their own and by discriminatorily suspending Omer Jones for attending the contract negotiations in Dallas and Baltimore and serving as a member of the bargaining committees at those plants (Pet. App. 35a-41a, 107a-108a).

In finding unlawful the Company's discontinuance of in-plant negotiations and payment to employees serving as Union negotiators, the ALJ recognized that "[a]n employer is not under any statutory obligation to make the plant premises available for bargaining negotiations or to pay employees on the Union bargaining committee for lost working time" (Pet. App. 96a). Nevertheless, here, he found (*id.* at 95a), "had the Unions not attempted to include outsiders on their bargaining team, [the Company], at all four plants, would have continued to make the plant premises available for bargaining and would have continued to pay the employees for the lost working time spent in negotiations" (Pet. App. 95a). The ALJ also rejected the Company's contention that its security policy of not allowing non-employees in its plants (except on guided tours) required that negotiations be conducted outside the plant if outsiders were to be included on the negotiating committees. Noting (*id.* at 96a) that no objections had been made in past years to the presence of Union attorneys on negotiating committees and that the three outsiders who were scheduled

to participate would not create a security hazard, the ALJ concluded (*ibid.*) that the Company had "seized upon its security policy as a pretext to dissuade and to make it more difficult for the Unions to include outsiders on their bargaining teams" (Pet. App. 96a). Nor was the ALJ persuaded by the Company's assertion that the issues of access and payment had been resolved "by mutual agreement," *i.e.*, that the Unions' proposal to include outsiders in their negotiating committees constituted a request for a change in bargaining conditions, which the Company countered by an offer to meet outside the plants, which in turn was accepted by the Unions. Rather, the ALJ explained (*ibid.*), "the addition of the outsiders to assist in the negotiations [was not] a change in the bargaining process any more than would be the addition of an attorney, a pension expert, an economist, or anyone whom the bargaining representative believed could be of assistance in bargaining."

Although the ALJ had accepted as reasonable the Company's position that the *contractual* provision for leave for union business was limited to local union business (see page 3 note 3, *supra*; Pet. App. 97a), he nevertheless concluded that the Company's refusal to grant employees uncompensated leave to attend negotiations at other plants was unlawful. The ALJ noted that, in view of its refusal to bargain on weekends or evenings (Pet. App. 99a-100a), the Company, "by denying the uncompensated leave and vacation days, where the purpose of the leave was to participate as a member of the Union negotiating committee at another of the plants, effectively impeded the availability of such representatives to participate" (Pet. App. 101a). The ALJ explained, relying on *Indiana & Michigan Electric Co.*, 235 N.L.R.B. 1128 (1978), supplementing 229 N.L.R.B. 576 (1977), enforced, 599 F. 2d 185 (7th Cir. 1979), cert. denied, 444 U.S. 1014 (1980), that, while an employer does not have to "concede to a Union's request to meet outside of normal

working hours in all cases" (Pet. App. 99a), it may not refuse to do so and at the same time deny uncompensated leave, where the purpose and effect is to frustrate the union's ability to have non-unit employees on its bargaining team (Pet. App. 99a-102a).

The Board's order requires the Company, *inter alia*, to cease refusing to make its plants available for negotiating sessions or to pay employee negotiators in retaliation for the Unions' selection of outsiders to serve on bargaining committees (Pet. App. 109a), and to cease denying to its employees "uncompensated leave and/or vacation time" for them to participate in contract negotiations at other plants (*id.* at 109a-110a). The order also requires the Company, among other things, to reimburse the Unions for the sums spent by them for the use of the off-plant facilities during the 1976-1977 contract negotiations; to make the unit employee members of the bargaining committees whole for any pay lost as a result of work time spent in contract negotiations at their respective plants; and to make Omer Jones whole for any pay lost as a result of, and to expunge from his personnel file any reference to, the discriminatory suspensions imposed on him (*id.* at 37a-38a, 110a).

3. The court of appeals upheld the Board's decision and enforced its order in all but one minor respect, with one judge dissenting (Pet. App. 1a-34a).[5] The court agreed with the Board that the Company had engaged "in conduct which effectively chills its employees' right to select their own bargaining representatives by preventing or discouraging those representatives from fully participating in the negotiations" (*id.* at 11a). It also agreed that substantial

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[5]The court declined to enforce that aspect of the order requiring the Company to sign the 1977 Kansas City contract because that contract had expired by its own terms in 1980 (Pet. App. 21a). No issue concerning this aspect of the court of appeals' decision is involved here.

evidence supported the Board's findings that the Company's assertion of security needs as a justification for its refusal to permit the negotiating sessions to be held within the plant facilities was "a mere pretext," that the Unions had not agreed to the changes in procedure, and that the changes were imposed "as retaliation over the union's inclusion of outsiders" (*id.* at 12a).

The court rejected the Company's assertion (Pet. App. 31a) that the Board's order forces the Company "to capitulate on three bargaining issues—making the plant premises available for negotiations, paying local employee negotiators, and granting employees uncompensated leave to participate in negotiations at another company plant * * *." Rather, the court explained (*ibid.*),

> the prohibition simply does not impose new contractual provisions on the parties. Procter & Gamble may refuse to bargain on its plant premises for other valid business reasons, it does not have to pay local employee negotiators indefinitely, and it is free to develop the form of leave to be granted.

The court also concluded (Pet. App. 13a) that serving as bargaining representative for another union fell within the "good and sufficient reason" criterion of the personal leave provisions contained in at least the existng Port Ivory and Dallas collective bargaining contracts. The court added (Pet. App. 14a):

> * * * Procter & Gamble has the first shot at placing limits on uncompensated leave as long as its limits do not interfere with employees' statutory rights, and particularly with their choice of bargaining representatives. Procter & Gamble also has some leeway to grant employees vacation time or to meet evenings or weekends rather than to grant any uncompensated leave, although utilizing these options necessarily is limited

because of the geographic distances involved. There is no indication that the uncompensated leave remedy will be abused in a manner disrupting Procter & Gamble's business operations. That Procter & Gamble may limit such leave for valid business reasons or choose other alternatives demonstrates the contrary. Procter & Gamble's options also demonstrate that the Board's order does not impose a new contractual provision upon the parties. The cease and desist order serves only to remedy the unfair labor practices found in this case, and as such, we hold that it is a proper exercise of the Board's wide discretion in fashioning remedies. *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575, 612 n.32 (1969); *Fibreboard Paper Products Corp.* v. *NLRB*, 379 U.S. 203, 216 (1964).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review by this Court therefore is not warranted.

1. The Company does not dispute the settled propositions that employees and their designated bargaining representatives have the right, absent extraordinary circumstances, to select whomever they wish to represent them in bargaining negotiations, and that a demand for non-unit employees' participation in bargaining negotiations is encompassed in that right so long as it is not tantamount to insistence on company-wide bargaining. See, *e.g.*, *NLRB* v. *Indiana & Michigan Electric Co.*, 599 F. 2d 185, 190 (7th Cir. 1979), cert. denied, 444 U.S. 1014 (1980); *Minnesota Mining & Manufacturing Co.* v. *NLRB*, 415 F. 2d 174, 177-178 (8th Cir. 1969); *General Electric Co.* v. *NLRB*, 412 F. 2d 512, 516-517 (2d Cir. 1969); *Standard Oil Co.* v. *NLRB*, 322 F. 2d 40, 44 (6th Cir. 1963). The Company also does not appear to dispute that it could not lawfully alter its

practices of holding negotiations in the plant and paying employee negotiators for the time spent in negotiations during working hours if its purpose were to interfere with its employees' right to select their own representatives.[6] Rather, the Company repeats its assertions (Pet. 6), rejected by the Board and the court of appeals, that it had legitimate security reasons for insisting that the negotiations be conducted outside of the plants and that the access and compensation issues were mutually agreed upon during negotiations with the Unions. These contentions merely take issue with the Board's findings, upheld by the court of appeals, that the Company's alleged security concerns were pretextual and that the changes were imposed unilaterally with a retaliatory motive.

The Company's further contention (Pet. 5, 13-15) that it cannot be faulted for denying its employees leave to attend negotiations at other plants because it reasonably interpreted the contractual union leave provision as limited to local union business similarly ignores the Board's actual findings. The Board, upheld by the court of appeals, did not find a violation simply in the denial of union leave, but rather concluded that the Company's simultaneous refusal to grant vacations or to negotiate during non-working hours operated unlawfully to interfere with the Unions' inclusion of outsiders in their bargaining committees.

The only issue raised by these contentions is whether substantial evidence supports the findings of the Board. That fact-bound issue does not warrant review by this

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[6]The petition does not challenge the Board's findings, upheld by the court of appeals, that the Company unlawfully refused to sign the Dallas and Kansas City contracts, threatened the Port Ivory employees with a less favorable contract and discriminatorily denied vacation leave to two employees, all in retaliation for the Unions' efforts to have outsiders attend bargaining negotiations.

Court. *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 490-491 (1951). In any event, as shown in the statement, *supra*, the Board's findings have ample support in the record.

2. There is no merit to the Company's additional contention (Pet. 17-18) that the Board's order improperly dictates substantive terms and conditions of employment. The Board's order does not require the Company to agree to continue negotiating on its premises and paying employee negotiators for work time lost during negotiations. What it does require is that the Company not discontinue these long-standing practices in retaliation for its employees' exercise of their right to choose their own representatives. As the court of appeals pointed out (Pet. App. 31a), the Company is free to cease bargaining on its premises for any valid business reason and may cease paying employee negotiators as well if those decisions are reached after good faith bargaining.

Similarly, the Board's order does not impose a new union leave provision on the parties. To the contrary, it affords the Company the alternative of granting vacation or some other form of uncompensated leave to employees intending to participate in negotiations at another Company facility. Nor does the Board's order preclude the Company from restricting such leave for legitimate business considerations; it merely is intended to ensure that the Company cannot again interfere with its employees' participation in negotiations at other plants through a simultaneous refusal to grant time off or to negotiate during non-working hours.[7] The

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[7]The Company's assertion (Pet. 12-14) that there is no statutory right to leave for the purpose of participating in bargaining negotiations at the employee's own plant, much less at other plants, misses the mark. The Board's position is not that an employer must grant leave for such a purpose, but that it may not withhold it for the purpose of frustrating the employees' right to select their own bargaining representatives.

Board's order is, therefore, a proper exercise of its remedial authority. See *NLRB* v. *Indiana & Michigan Electric Co.*, *supra*, 599 F. 2d at 191 (enforcing order requiring employer to grant uncompensated leave to employees where employer also had refused to negotiate during non-working hours).[8]

The Company's reliance (Pet. 17-20) on *Porter Co.* v. *NLRB*, 397 U.S. 99 (1970), and *NLRB* v. *American National Insurance Co.*, 343 U.S. 395 (1952), is misplaced. In *Porter*, the Court disapproved a Board order that required an employer to grant a union a collective bargaining agreement clause providing for a checkoff even though the employer had not agreed to such a contractual provision during the collective bargaining process. In *American National Insurance*, the Court held that an employer's good faith bargaining for a management functions clause does not violate the Act. Here, the Board's order requires the Company neither to accede to any substantive collective bargaining agreement term nor to cease seeking a particular clause during negotiations, but merely to refrain from action that unlawfully interferes with the Union's right to choose its negotiating representatives.

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[8]The Company's attempt (Pet. 15) to distinguish *Indiana & Michigan Electric Co.* on the grounds that the collective bargaining agreements in that case contained no union leave provisions restricting leave to local union business and that there had been a past practice of granting leave to employees, who were all members of the same union, to attend and participate in other units' negotiations, ignores the fact that the Board's finding here was not based on the union leave provisions, but rather on the Company's refusal *either* to grant vacation or other leave *or* to negotiate during non-working hours. In this respect, the facts of this case are on all fours with *Indiana & Michigan Electric Co.* See 599 F. 2d at 191.

Grief Brothers Corp. v. *NLRB*, 635 F. 2d 531 (6th Cir. 1980), on which the Company relies (Pet. 16), does not conflict with the decision below. In that case, employees at 21 of a Company's plants requested leave to attend an international union conference, which was scheduled during the week rather than over a weekend for the convenience of the

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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international's staff (635 F. 2d at 532). Here, the vice in the Company's conduct is not simply that it denied leave, but rather that it simultaneously refused to meet at a time when the employees who had been denied leave could participate.